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FOREWORD

MILITANT ARBITRATION

DURING all the wars that have gone before, arbitration has been the first victim of the nations at war and an early casualty within each nation involved.

In this world war, behold arbitration among the priorities. The President of the United States has said it must be given preference whenever it has been written into labor contracts. Government contracts themselves use it as a "convoy" for the safe and fast delivery of supplies. Business is adopting it as wartime insurance for the quick and economical settlement of commercial disputes. Labor and management have both responded to the bugle call and put arbitration into the production lines to back up the men on the fighting lines. Thus arbitration doffs its age-old mantle of futility and defeatism and appears in the production line valiantly fighting to help win the war.

Arbitration is everywhere alive and active. It is in the President's Executive Orders and it makes news in headlines. It is on executive's desks, it animates conferences, it is found among the grime of machine shops and in the hum of factories. Arbitration is on the look-out for the ugly head of every dispute and it noses out and puts to rout grievances, disputes and differences that lurk in crevices to give aid to psychological warfare.

Arbitration in the Americas today is the recognized ally of every ship that is launched, every plane that takes flight and of every tank and gun that go to the front. It is the ally of the general who cries out for men and more men and of every foreman bent on saving time.

Arbitration that heretofore has always died in war is now a rallying cry for speed and more speed, for self-effort and more self-effort, for faith and more faith, and for cooperation and more cooperation. This tremendous upsurge of arbitration comes from the democratic realization that force will speed bullets but cannot make them; and that force will crush the enemy but cannot unite our own men in a common effort. It comes from the profound conviction that self-regulation and the smooth running of free enterprise pile up more fighting machines and fighting men than do the law or the lash.

For the winning of this war, Americans must do without many things. Rubber, metals, sugar are denied them; cars must be conserved and uncertainties loom for essential oils, fats and the warmth of wool to which they are accustomed. But the supply of arbitration is unlimited. Both its spirit and its practice can be pumped into a strike-threatened plant or a cantankerous obstructionist overnight.

This upsurge of arbitration as a militant ally in winning the war is no accident. It is the product of the methodical American way of welding spirit with fact and organization with idealism. Before and during the world war, there were in the United States no beneficent arbitration laws that enabled men to foresee and forestall disputes. Now they exist. There was no national system of arbitration with a thousand outposts and ten thousand sentinels. Now they are here. There was no national leadership and policy. Now these bulwark production.

Then there was no technique of arbitration to meet the challenge of internal strife. Then there were tactics but no grand strategy. There was no mechanism or equipment to rush into the breach to repair the ravages of ill-will, envy and greed, of competition for power. Now these are at hand. There was no "arbitration convoy" to protect a cargo that might be torpedoed en route by a vicious controversy. Now arbitration travels with the contract and throws an iron-clad defense around production for war.

Today arbitration does not knock—it hammers on the door of the recalcitrant. It does not wait for an invitation from the receptive, it presents itself ready for action. It does not take "no" for an answer, but plugs home demonstration after demonstration of its skill. It does not wait for the signal of distress, but flies its own challenge to the far-sighted. It does not pine away in the dark memory of old defeats, but marches boldly in the ranks of fighting men, ships and planes. Victory begins on the production line, and there arbitration is at work on a three-shift, seven-day week schedule.

And so passes from the American scene the passive arbitration of yesterday. So arises the arbitration of tomorrow that takes the offensive, with its militant power and technique to sustain the present and deal with the future. It is no longer arbitrate *or* fight. It is arbitrate *and* fight. For a permanent place in the organization of a future peace, arbitration keeps faith with those who are fighting for the right to organize that peace.

ARBITRATION IN ACTION

Announcement

In conformity with the program of the Federal Government to alleviate the shortage of paper, and in order to do its share in relieving the acute transportation and mail demands, the JOURNAL will omit its summer number and will issue interim Bulletins and a slightly larger fall issue in order to include the immense amount of interesting material which is accumulating. In the meantime, every effort will be made to keep JOURNAL readers advised of up to date happenings at a minimum cost of paper.

Two Pioneers in Arbitration Honored

An organization that has kept arbitration in action for nearly two centuries and is older than the American Republic itself, and an individual who for forty-eight years of service to that organization has never wavered in his support of and encouragement to arbitration, will be honored on June 9, 1942.

On that date the Chamber of Commerce of the State of New York, whose first Arbitration Committee began to function on May 3, 1768, will be presented with the Annual Award of the *Importers Guide* for the Advancement of Arbitration in Foreign Trade, in recognition of its long service in this field and of its great historical contribution to arbitration progress in the United States.

At the same ceremony, the American Arbitration Association will present its 1942 Gold Medal for Distinguished Service in Commercial Arbitration to Charles T. Gwynne, Executive Vice President of the Chamber in recognition of his invaluable service to the cause of arbitration during his long association with the Chamber.

The ceremony at which the Awards will be presented will take place in the Great Hall of the Chamber of Commerce of the State of New York, at four o'clock. One hundred business leaders are joining in honoring the Chamber and Mr. Gwynne by serving on the Committee on Arrangements.

Plowshares into Swords

The beating of swords into plowshares is a process that, temporarily, is being reversed in American Industry on a scale and in a manner that is one of the miracles produced by the genius of American business men. In many cases where an entire industry has converted from peacetime needs to wartime necessities, arbitration has been enlisted to procure the fullest measure of output. For example, when the Washing Machine Industry converted to national defense production, particularly the manufacture of anti-aircraft gun mounts, the clause of the American Arbitration Association was incorporated in the standard form of sub-contract utilized on this project. How arbitration fulfilled its part when the test came in the form of a dispute between two firms engaged in the manufacture of vitally needed anti-aircraft gun parts is told by the attorneys who represented the parties in the arbitration proceeding (p. 108).

War Service Committee

In this world-wide, titanic combat for right against might and for freedom over slavery, the American Arbitration Association is mobilizing all of its national and international resources to drive disputes out of home production lines so there will be no delay in sending munitions, supplies, tanks, planes and ships to the fighting lines of the world.

The resources of this Association were built in times of peace to strengthen goodwill and confidence and common endeavor among ourselves and to guard men engaged in commerce and industry against such insidious foes as dissension and disputes.

With the establishment of a War Service Committee, composed of American business and labor leaders who believe in arbitration as one of the great forces which can aid in winning this war, the Association has launched a drive to put this program even more actively into effect. William Fellowes Morgan, Jr., is Chairman of the Committee, which is now laying plans to pipe arbitration into every American industry.

Speedier Justice in New York City

Lawyers who have practiced for any considerable number of years in the courts of New York City, especially in the Municipal Court, are only too familiar with the long period of waiting formerly required for cases to reach trial—three or four years in

some branches. In one claim which was finally referred to arbitration in 1934, the case had been seven years in reaching adjudication, and instead of an "infant" plaintiff, a grown woman of 21 years appeared at the arbitration proceeding.

The Annual Report for 1941 of the Municipal Court of the City of New York by President Justice Pelham St. George Bissell carries reassuring news of the condition of court calendars, which Justice Bissell reports now to be excellent. Periods of waiting have been eliminated in some parts of the Court, as at Central Jury Part, Brooklyn, while in others the delay has been reduced to months instead of years.

A section of the Report dealing with arbitration discloses that this method has had a considerable part to play in the relief of congestion that has been effected in recent years. Much of this is due to the wholehearted and effective cooperation of President Justice Bissell in bringing about the arbitration of pending claims where one party indicates a willingness to arbitrate. During the year 970 pending claims were submitted to the Accident Claims Tribunal of the American Arbitration Association. The Arbitration Committee of the Brooklyn Bar Association has also been active, and both the Bar Association of the City of New York and the New York County Lawyers' Association have collaborated.

"It has been found," says the Report, "that arbitration requires stimulation." And it adds: "From time to time letters are received from attorneys commending the manner in which their cases were disposed of by the arbitrators. When attorneys and litigants learn the advantages to be derived by submitting their controversies to arbitration, it will doubtless be used more frequently."

Arbitration and the Practicing Law Institute

Arbitration passed another milestone in its acceptance by lawyers when, for the first time, the subject was included in the list of topics scheduled for discussion by the members of the Practicing Law Institute. The meeting of the Institute on May 11, 1942, was devoted to an address by Sylvan Gotshal on "Arbitration," followed by a round table discussion of the subject. Mr. Gotshal, who is a director of the American Arbitration Association and an attorney who has "practiced" arbitration on many occasions, divided his address into three parts: Arbi-

tration in Wartime; Outline of Arbitration Procedure as Established by Court Decisions; and The Lawyer's Place in Wartime Arbitration.

Arbitration in Action Brought up to Date

Arbitration in *Action,* published in November 1941, will have three supplements in the first half year since its publication. The first supplement contains all of the important case decisions since the book was published. The second supplement consists of Questions and Answers upon the American Arbitration Association—what it is and how it operates. The third supplement is a series of questions and answers on labor arbitration, written in response to inquiries to the Association to clarify and amplify certain points of its practice as set forth in *Arbitration* in *Action.* To holders of *Arbitration* in *Action,* these are available at 25 cents each per copy and to non-holders for 50 cents per copy.

Subscribers to the JOURNAL may receive these publications, without charge, upon request.

The Bar Maintains Arbitration Traditions

Since the last report of the Committee on Arbitration of the Association of the Bar of the City of New York appeared in the pages of the JOURNAL, arbitration has been kept in action by the Committee in a manner in keeping with the traditions of the organization that did so much toward establishing this modern practice on a firm legal foundation in its early days. A year of activity of the Committee, under the Chairmanship of William J. Mack, culminated in its issuance of a revision of its *Outline of Arbitration Procedure,* revised to meet the ever-increasing emphasis being given to arbitration as a wartime measure and as the Committee's contribution to spreading the knowledge of what arbitration is and how it works, both in commercial and labor disputes.

The Committee has also enlarged its standing panel of arbitrators who may be called upon to act in matters referred to the Committee for arbitration.

Last year the Committee drafted a number of proposals for the adjustment of labor disputes in defense industries without stoppage of production and, acting individually, submitted them to President Roosevelt and to leaders of labor and management. Since the series of steps outlined in the proposals have been

used in a number of instances, the members of the Committee feel well repaid.

In the legislative field, the Sub-Committee on Amendments to the U. S. Arbitration Act, composed of Osmond K. Fraenkel, Robert E. Goldsby and Meyer Kurz, have actively cooperated with Dr. Wesley A. Sturges, Chairman of the Arbitration Law Committee of the American Arbitration Association, in the preparation of draft amendments to the Federal Arbitration Law, which are now embodied in a Bill pending in Congress. If enacted, they will immeasurably increase the effectiveness of arbitration as a wartime measure, not only in commercial and labor disputes incident to war production, but in the period of economic readjustment following the war.

Support of the proposed amendments to the Federal Arbitration Law was also given by the Arbitration Committees of the New York County Lawyer's Association and the National Lawyers Guild, of both of which Moses H. Grossman is Chairman. Much of the attention of these two committees has been devoted to stressing to lawyers the great opportunity which voluntary arbitration offers to them in serving to speed the war effort, and this has been the subject of several joint meetings of the Committees. At such a meeting held on February 9, 1942, the following resolution was adopted:

> "That those assembled, representing the Arbitration Committees of the National Lawyers Guild and the New York County Lawyers Association, pledge their support to the use of mediation and voluntary arbitration in a national effort to have these procedures adopted by management and labor as a means of saving the time and effort of the manpower so necessary to national defense and as a means of keeping the American inner defense lines free of disputes that would further tax the Government in its all-out effort to win the war."

LABOR ARBITRATION IN WARTIME

MATTHEW WOLL *

AMERICAN Labor has voluntarily determined to lay aside, for the duration, the right to strike! That is headline news.

President Green of the American Federation of Labor reaffirmed this stand on March 26, 1942, when he told the House Naval Affairs Committee: "I publicly disavow any strikes of any kind by any A. F. of L. union for the duration"; pledging that leaders who attempted to call wildcat strikes would be disciplined. President Murray of the CIO made a similar statement.

In his stand, President Green was reaffirming the position taken by the Executive Council and the heads of the national and international unions of the A. F. of L. meeting shortly after Pearl Harbor. At that time they issued a statement which contained the following program:

> 1. That a "no strike" policy shall be applied to all war and defense material production industries. This means that all workers employed in war and defense material industries should voluntarily relinquish the exercise of the right to strike during the continuation of the existing state of war except where mediation, conciliation or arbitration is refused by employers.
>
> 2. That a national agency similar to the War Labor Board which functioned during the World War be created by Executive order for the purpose of dealing promptly with grievances, differences and complaints which may arise between employers and employees. Existing labor stabilization agreements or understandings and their administration shall in no way be interfered with or be impaired.
>
> 3. That through the utilization of such agency, mediation, conciliation and voluntary arbitration be substituted for strikes and lockouts in all war and defense production industries.
>
> 4. That the mediation and conciliation service of the Government be strengthened and, if necessary, increased so that it may quickly be made available for use in the settlement of grievances and disputes which may arise.
>
> 5. That due regard for the health, safety and welfare of workers must be accorded them if and when they are called upon to work over-

* Second Vice President, American Federation of Labor. Mr. Woll's article is the second in a series on this subject, the first, by Mr. William P. Witherow, President of the National Association of Manufacturers, having appeared in the Winter, 1942, issue of the JOURNAL.

time or in plants which may be placed upon a double shift or continuous working time basis. In all such situations the standard 40-hour work-week shall be maintained and protected as a basis for wages paid and the standard rule for overtime pay religiously observed.

The right to strike is labor's main dependence in establishing rights and maintaining demands. This pledge to lay aside the exercise of this right was, in fact, disarmament by unions for the duration of the war—a genuine sacrifice.

Where unions are accepted agencies and it is the practice to talk over joint relations until an agreement is reached, the no-strike pledge will make little difference. In such instances, collective bargaining is the accepted method for adjusting all difficulties and both parties are satisfied with results. But where labor relations have not advanced to the discussion of facts as a basis for decisions, the Government must provide special agencies for mediation and arbitration of disputes that are not settled by collective bargaining.

In mediation and arbitration, decision lies outside of the two parties at interest and is reached by balancing interests so as to make a reasonable adjustment. In this necessity for balancing gains for both sides, lies the fundamental difference between direct negotiations between the two parties concerned and reference of issues to a disinterested outside person or agency.

The parties concerned, for whom the maintenance of joint relations is a matter of primary concern, know the intimate details of production, sales and distribution of returns on joint work, so that they are able to propose new standards and new undertakings with experienced understanding of their practicability, and to assume a responsibility in which they themselves must make good. Collective bargaining, therefore, has been more effective in maintaining industrial peace than any other method.

Labor well knows strong unions are more effective in collective bargaining than weak ones. When unions, therefore, agree not to use their collective power by means of a strike they have agreed to lay aside and not to use their defensive weapon from which constructive power is derived. Labor freely made this war sacrifice in order not to impede national defense of our free institutions which assure opportunities to all.

Where collective bargaining is newly established, frequently employers adopt tactics that force reference to governmental agencies. This is unfortunate because it delays the development of the constructive benefits from collective bargaining.

The abandonment of the right to strike places a heavy responsibility, in labor's eyes, upon those agencies that have been set up to help settle industrial disputes. For it is the right to strike, though not necessarily the strike itself, upon which, in normal times, labor mainly relies to obtain a fair collective agreement; it is the right to strike which gives labor that nearer approach to equal bargaining power for which it organizes. Consequently, in voluntarily abandoning this right labor is making a real sacrifice, not so much in terms of the relatively few cases where it is foregoing actual strikes, as in every negotiation where it is weakening its own bargaining power through this one-sided disarmament. And because its collective strength, without the right to strike, will frequently not be able to obtain for labor a fair deal, labor will have to rely more and more on government agencies to settle industrial disputes.

In ordinary times labor would not be willing to place so much responsibility for its welfare upon the government or any other "outside" agency. It is not prepared to forego the strike for arbitration permanently; hence its insistence that this sacrifice is for the duration only.

But these are not ordinary times! America is face to face with one of the gravest crises in her own history as well as in the history of western civilization. We have just suffered in the Phillipines the greatest reversal on the field of battle that we have ever experienced in the annals of our nation. The heroes of Bataan will receive, as they properly deserve, encomiums of praise from people throughout the length and breadth of this land. They could not have fought more bravely than they did in their fox-holes and it is probable that we could not have rendered them more aid than was rendered to them in their embattled positions. But the fact remains that this defeat makes our task doubly difficult and calls imperatively for a quality of leadership, both in labor and in management, which is adequate to the hour. We now know, after the succession of disasters and defeats from Pearl Harbor to the Bataan Peninsula, that we cannot win this war by any other process than through sacrifice and cooperative effort. We need a unity of thought and of action unparalleled in our history. Internal differences, whatever they may be, must give way in this hour to policies which have been necessitated by the exigencies of war.

So it is that labor realized that the machinery must be kept going every possible hour and in every possible way. The pledge of unity for war production recently given by William Green and Philip Murray at their joint meeting in Pittsburgh will have its real significance, not in the words that were uttered there, but in the manner in which labor implements that pledge in the workshops and on the assembly lines and around the conference table. If such meetings are held throughout the country, as it is planned that they shall be held, and every effort is made to rally the forces of organized labor in a great all-out demonstration of cooperative effort, it will be one way of demonstrating the determination of labor for all-out effort in this all-out struggle.

But to expect that there will be no more industrial disputes in the face even of this all-out effort is to expect the impossible. They can be reduced to a minimum, as indeed they should be. But the dynamic character of our industrial life, the problems of adjustment and readjustment, will produce certain friction points here and there. It is inevitable that such frictions should appear; it is not inevitable that they should permanently delay our cooperative effort if we have the will and the determination to subordinate these lesser questions to the larger goal that we have set before us.

It is well always to remember that in such a crisis action is the indispensable requirement of every effective government. Inaction would be fatal to national security. It is for that reason that any industrial disturbances which effectively impede the war effort will have to be dealt with promptly and justly. But what is the interest of any efficient government in wartime is no less an important element of sound industrial relations, namely, that questions at issue be resolved with promptitude and in accordance with fairness, equity and justice. What I am saying, in a word, is that there is a clear and definite link between this united effort of the army of production and the armed forces on the front lines. We cannot suffer a breach in the line of communication from workshop to battlefield. We cannot permit interruption in the flow of goods and materials, nor can we permit delays to render ineffective the effort of those who are guarding our outposts.

Since the December 15 pronouncement there have been virtually no strikes save for a smattering of wildcat walkouts of brief duration. To be perfectly frank we must admit that there are

likely to be further scattered walkouts from time to time. England's experience indicates this, for in that country, whose model industrial relations are so often held up to us as an example, there has been a substantial volume of man-days lost through strikes, even since Dunkirk.

The reason for this is that the labor movement is not, as its opponents like to picture it, a centralized dictatorship. If workers in a plant find conditions intolerable and simply refuse, either individually or collectively, to go to work, it is very difficult for labor officials or anyone else to force them to work. The point is that the influence of labor officials will be in the direction of discouraging strikes and certainly not in the direction of "agitating" the membership.

The restraint by workers in the face of numerous attempts by employers to take advantage of labor's inability to retaliate has been noteworthy. It is in sharp contrast to the behavior of the former head of the T. P. & W. railroad, who defied repeatedly requests to arbitrate, including those coming from the President. The lack of condemnation of such behavior by the press and Congress is in contrast to the outburst that could have been expected had a labor official acted in the same way. Labor unhesitatingly condemns such hard-headedness in these days, whether it be on the part of management or from its own ranks.

There has been much clamor in the press and elsewhere for the National War Labor Board to lay down a "national labor policy," a set of fixed principles that would be used to settle further labor disputes. It is not in the interest of uninterrupted and constantly increasing production to adopt inflexible industrial policies—rather it is in the interest of production efficiency and maintenance of civilian morale, as well as of decent basic standards of living, that flexibility should characterize the policies governing wartime industrial disputes.

We should not and must not make a fetish of the idea of a fixed policy and believe that it will enable us to "solve" the "labor problem." The very necessities of war require flexible policies and procedures to meet constant and, when necessary, sudden change. Those charged with the trust of settling wartime industrial disputes must approach the problems involved in a commonsense way and render decisions upon the basis of a fair balancing of employer, labor and public interest.

It is not the primary function, if indeed it is any business at

all, of the War Labor Board to lay down a national labor policy governing all industrial relations. Its primary duty is to settle the particular disputes that come before it, to propose settlements under which, in the plainest terms, the men will be willing to work and the employer will be willing to employ. It is more important for it to find these grounds than it is to be consistent or to develop a body of labor theory. If a precedent interferes with the settlement of a particular dispute, the precedent must give way.

This is especially true in the case of an organization like the War Labor Board which mixes mediation and arbitration. An arbitration board can set a "labor policy"; a mediation board, arranging settlements through bargaining and compromise, cannot. The American Arbitration Association in its own literature has pointed out the difficulties that arise when a board tries to mix mediation and arbitration functions.

The circumstances in different plants are so unlike, in terms of economic conditions and traditions of collective bargaining, that it is next to impossible for anyone to formulate a set of general principles that will be either fair or acceptable in every case. Nevertheless the Board cannot help laying down certain indications of labor policy in the near future, perhaps in decisions that will have been made by the time this article appears. The issues that will come before the Board fall into three main types, each of which demands a special type of treatment.

First, there are wage problems. Certainly we need more of a national labor policy than we have had in this field, and something more adequate than that the higher wages are the better, in order to keep up with the rising cost of living; or that the lower wages are the better, in order to prevent inflation. We must not let the false alarms of "Wolf, wolf" that we have heard from those who feared inflation in past years blind us to the fact that there is real danger of inflation, and that in the next few years there simply will not be enough goods to go around, regardless of how much money we may have to buy them. On the other hand it must be recognized that high wages are not the main cause of inflation, nor higher profits the best possible cure.

Second, there are disputes having to do with hours, speed of work, and working conditions involving health and safety. This type of dispute is the natural field for arbitration and the easiest to arbitrate, for both sides are agreed that the ruling criterion

for the duration must be maximum production, and both sides are agreed that an objective verdict as to what conditions will make for maximum production is the best settlement.

Despite the campaign carried on by the press and Congress to create the impression that workers are delaying war production by refusing to work longer than 40 hours a week, the 40-hour week on war work is to be found only in continuous process industries. Actually the hours prevailing now are 48, 50, 55, 60 and even 70. But to maintain standards necessary to conserve labor power and manhood, excessive hours must be penalized by overtime. These standards are equally necessary to maintain production of supplies needed on the fighting front.

Third, there are disputes over industrial rights and union status. Here labor is convinced that the war affords no occasion for breaking down union standards. Representative government in industry is just as important in time of war as it is in time of peace, even more so in fact. Stable unions and practices of collective bargaining are not handicaps but aids to production. Labor's unique store of practical knowledge of the workings of industry can be utilized in many ways to increase production, and labor's own organizations can be used to assure the willing cooperation of the workers in whatever programs are arrived at by negotiation or arbitration. If labor had to put into a single phrase its own view as to what its role should be in the war effort, that phrase would be: *equal partnership and equal sacrifice.*

Mr. William Witherow, President of the National Association of Manufacturers, contributed an article on this same topic to the winter number of the JOURNAL, and the editors have requested me to present labor's attitude toward wartime arbitration. I have not taken issue with Mr. Witherow because his was not, except for some secondary points, a controversial paper, and besides, this is not the time for controversy. It is a time for all groups in labor, management and the government to pull together.

Labor has shown, in the unprecedented degree of cooperation that has been worked out between A. F. of L. and CIO, that it means business. Cooperation between organized labor and business is equally indispensable.

Mr. Witherow opens his article with a four-point statement:

> *First*, no industrial dispute of any kind must be allowed to interfere, even for a day or an hour, with the first job of this country and every citizen in it—namely, the speedy production of the vast amounts of war material called for by the nation's gigantic War Program.

> ***Second,*** management and labor must make every effort to adjust their differences, in wartime as well as in peacetime, *on a voluntary basis* before inviting governmental intervention. Compulsory governmental settlement of labor disputes is contrary to American principles.
>
> ***Third,*** in the settlement of industrial disputes, through governmental machinery—whether conciliation, mediation, or arbitration—the procedure must be orderly and the results fair to all parties and not in conflict with the public interest.
>
> ***Fourth,*** such sacrifices of freedom and liberty as may be made temporarily during the emergency by industry and labor for the good of the nation must not be allowed to become permanent when the emergency has passed.

There is nothing in this program to which labor will not give its whole-hearted assent. It has been said that the philosophy of Nazism is that voluntary cooperation among groups is impossible, that the nation must be held together by force. Conversely, the American philosophy is that voluntary cooperation among labor, business and government is not only possible but is the best way to assure maximum production.

Voluntary arbitration is the most effective method when the parties concerned are unable to agree. Many unions write arbitration provisions into their agreements. Frequent use of arbitration has developed generally accepted rules and procedures so that the method is used with confidence of fair dealings by many of our long established unions.

It is for this reason that labor and employers alike, as Mr. Witherow points out, prefer voluntary, as opposed to compulsory, arbitration. Compulsory arbitration is far more of a restriction upon individual freedom than any of the closed shop issues about which there is so much excitement, and it is a restriction on collective freedom and freedom of association, as well. Nor is it any guarantee of industrial peace; indeed, friction engendered by government pressure in forcing unwanted terms on employers or labor may lead to additional interruptions of production.

It must, therefore, be the purpose and objective of both management and labor to meet and confer in the spirit of mutual interest and inter-dependency and to cooperate with one another in an atmosphere of understanding and voluntary agreement. It must likewise be the aim of the War Labor Board to apply the principle of voluntaryism wherever and whenever possible. Only in instances of extreme and irreconcilable conflict and disagreement between management and labor should resort be had to decision by the Board itself.

While labor, in the spirit of public interest and public good, as well as victory for our armed forces and the safeguarding of the democratic ideals of a free people, accepts such restraints upon its freedom and rights as may become essential during the extreme emergency through which our nation and our people are passing, we join with industry in the insistent demand that such sacrifices of freedom and liberty shall not become permanent in character, but shall cease whenever the emergency itself shall have passed.

TWENTY YEARS OF ARBITRATION

"I have been the Counsel of this association for more than twenty years. Prior to our using the American Arbitration Association actively, we were obliged to bring our claims, which have often run into the hundreds annually, to the attention of the courts, with the delays and expenditures consequent upon this procedure.

"Recognizing the value of the American Arbitration Association, we were very active in securing legislation in the State of New York to make this Association as valuable as possible, and the results have been more than satisfactory.

"All of our contracts of all of our associations call for the arbitration of all disputes and all claims of every character are adjusted by arbitrators through the auspices of your association.

"The net result has been that only a small percentage of claims actually go to arbitration but are settled by the parties because the arbitrations can be held so speedily and are so informal in their nature.

"After twenty years experience I do not believe that either the employees or the employers would care to revert to the old methods." (P. N. Turner, General Counsel, The Associated Actors and Artists of America.)

ARBITRATION OF JOB ASSIGNMENT DISPUTES

SOLOMON BARKIN *

ARBITRATION is of increasing importance in labor relations. Through it, many disputes and differences of potentially explosive qualities are peacefully resolved. Though no substitute for collective bargaining, it is an effective instrument in developing stable relations between labor and management.

Arbitration is now used to adjust differences on job assignments and, in this regard, performs four distinct services:

First, it helps to remove obstacles to *bona fide* collective bargaining when employers refuse to negotiate differences concerning job assignments.

Second, it settles differences in judgment arising from negotiations.

Third, it educates both parties in the best bargaining and negotiating methods.

Finally, it discloses and defines the vast unexplored field of knowledge in the scientific formulation of job assignments.

The highly individualistic nature of collective bargaining has placed upon the union the responsibility of educating employers. Through discussion and economic pressure, each employer must be separately instructed that job assignments are subject to collective bargaining as much as wages or hours of work. The process of arbitration is a sound educational method inasmuch as it gives ample opportunity for extensive argument and the orderly presentation of facts. Evidence on the extent of bargaining on job assignments, as well as the wisdom of such bargaining, may be presented. By helping to dissolve resistance to negotiations on this question, arbitration contributes substantially to the realization of effective collective bargaining.

After an agreement to bargain on work assignments has been reached, the parties are faced with the practical problem of reconciling their sharply differing views. These conflicts in the past have frequently been the cause of many bitter strikes. Arbitration machinery provides the method for reconciling them

* Director of Research, Textile Workers Union of America.

without strikes and it furthermore establishes patterns for these groups to follow in future negotiations.

These guides are necessary because the problem of setting job standards is one of the most difficult confronting labor and management. It is complicated by the fact that both parties start with widely divergent views. Each uses its own methods in fixing proper levels of productivity. The employer's views are largely governed by the immediate effects of a proposed standard of production and costs. He desires that level of work performance which will assure the maximum daily and weekly production compatible with the maintenance of quality and waste standards fixed by the management. Labor, on the other hand, believes that the work-day and work-week should not be so long or so taxing as to shorten the employee's work and life-span. Labor is against work-loads and job speeds which are likely to result in superannuation at 40. It expects them to be consistent with the needs of immediate productivity and the total production over the full life-span of the individual worker. Nor should they be wasteful of the economic and human costs involved or destructive of the workers' physical and mental health. Standards thus established would assure workers the longest possible period of life and economic usefulness. Unfortunately, too many mills, factories and entire industries violate these objectives, resulting in sharp clashes between labor and management in adjusting work speeds and job assignments.

It is often difficult to translate labor's objectives into precise measures. Sufficient information is not available, either to science or medicine, even approximately to measure the potential physical and mental effects of given jobs. Most of the damage is insidious. The disabilities or impairments become visible only after protracted periods of time. It is difficult to associate the job speed and work with the worker's physical condition. It has been possible to do so only in a relatively few situations, such as silicosis and other forms of poisoning or industrial disease. Workers must, therefore, rely on their own reactions to the job in order to determine the acceptability of any particular work standard. Unfortunately, these reactions may at best be indicative rather than conclusive.

Employers have sought more precise measures, but have been equally unsuccessful. They have, however, utilized the time-study technique which records only the time consumed to perform a job

by a given person or group of persons and does not indicate intensity of effort or the physical and mental drain involved. As such, it answers very inadequately, if at all, the demand for a scientific measure for job standards. Those employers who have attempted intolerantly to use this technique have created widespread resentment and numerous strikes. Organized labor considers the time-study technique as inadequate to measure actual work effort or to stand by itself as the proper method of arriving at job standards. The fact that many practitioners have abused time studies and definitely utilized them to sweat labor has strengthened labor's conviction. The efforts of employers to endow them with qualities of scientific accuracy have also forced workers entirely to resist or sabotage the technique.

While excessive false claims have been made for the present methods of setting job standards, the demand for real measure still prevails. Labor wants to find such a technique. Some labor unions have even been willing to utilize the time-study technique as a basis for evolving a practical method. They have been willing to experiment with the use of this measure as a basis for collective bargaining, during which time-study findings could be adjusted to meet the points of view of both labor and management. While the results cannot now be scientific, because available data for such objective measurements are inadequate, they will at least constitute the best working arrangement possible under present circumstances. The demands of employers for immediate high hourly productivity will be offset by labor's consideration for the workers as humans who are entitled to the longest period of full economic usefulness and physical life.

The process of arbitration is of great assistance in evolving a procedure for utilizing the time study on this experimental basis. Arbitration requires the introduction of all pertinent data and a free examination by the respective parties. Through it management has learned the desirability of granting the unions full access to all basic data. Unions have, therefore, been able to acquaint themselves with management's techniques, methods of investigation and application and their findings. The shroud of mystery has been lifted from the time study. The correlative right to check management's investigations and the right of labor to make its own have also stemmed from the union's newly-established right of access to basic information. These two rights

are the keystone for future cooperative relations between labor and management.

Out of our present experience has developed a general procedure for the joint use of time-study material with good results. That the union shall have complete, detailed and exact job specifications is a prerequisite. These must include not only the job routines, but also the methods and conditions for delivering materials; the condition of the machine and standards of work performance; conditions in the work room and methods and conditions for the removal of the material. They must define the job which is being studied and those jobs on which the standards are based. The rigid observance of these specifications is essential to the maintenance of the entire system. The writer has found that one strong reason for labor's outright antagonism to time studies is the failure to furnish unions with such job specifications and management's laxity in maintaining them.

Unions must be accorded every opportunity for full participation in each phase of the study. The judgment of the union representative and that of the workers on the job must be given full consideration. Unless they bring their experience, knowledge and points of view to bear, the studies will not have labor's confidence. Effective participation can be secured only over a period of experiment. Until such time as the union is competent to perform its own function, time-study results, even when accepted by local representatives, must be used with greatest caution. Full participation means, in part, that the union representatives aid in the selection of the place of study, periods and length of investigation and the choice of the persons to be timed. The workers are aware of the varying possible influences which might affect the job. Each study must be long enough fully to reflect the different tempos and conditions. Every variation which the worker discloses must be observed. All these decisions concerning the making of the study should be made jointly. This process is lengthy and costly. But there is no short cut to satisfactory results.

Even the actual timing of the job should be made by a number of observers. One man's observations are never adequate. Union observers and timers are advisable.

With these primary data on elapsed times for different job elements serving as raw materials, the employer and union representatives can start to formulate a proper job assignment, allow-

ances, rest periods and methods of wage payment. There are few available objective guides. The most important one is that rest periods have been found to be both economic for the employer and advisable for the employee's good health. Many unions have, therefore, insisted that lunch periods be away from the job and that specific rest allowances be provided during the day. The negotiations will usually tend to disclose the limitations and biases of the actual information obtained from the time studies and will most often result in some understanding. No union which participates in these studies feels obligated to accept them as final, as the entire method is inadequate and must be considered as a procedure for guiding labor's and management's judgments.

The arbitration process can be most useful in resolving differences that may arise during any stage of the time study. The third party can be helpful in hurdling disagreements on the representativeness of the job specifications, the period of the study, the persons timed, the conditions observed, the period of the investigation, the adequacy of the time or the methods of summarizing. Again the arbitrator will be helpful in interpreting the data secured and in answering for the purpose of the specific case questions concerning their meaning. While the arbitrator will only add his judgment to those of labor and management, he is likely to offer an outsider's broader perspective in reconciling them.

This description of the evolving technique for using time studies as a basis for collective bargaining discloses the importance of judgment in making the studies and in interpreting the data. We are no further advanced now in this art than attempting to perfect our estimates by taking better account of the human element on the job, about which we know all too little.

The arbitrator is not merely resolving specific differences, but he is helping to set a pattern to guide the parties in settling their own disputes. An arbitrator in the field of job assignment must be an individual who is prepared to weigh evidence objectively with a full appreciation of the economic and human factors and problems involved. He must be aware of the extravagant claims made by management for the time study and be prepared to limit the results of a fair time study to its rightful use; namely, the basis for collective bargaining. He must aid both parties in weighing their respective considerations.

While performing this educational function, the arbitrator can also contribute by defining the vast range of problems needing investigation. They become more numerous as we gain more intimate acquaintance with the problem. These must be referred to the governmental agencies for investigations and to universities for analysis. These problems must be met to aid us in the wisest use of our industrial army. Sound job assignments will contribute as much as any factor to the improvement of industrial morale and maintaining effective production and a healthy working population.

While we are developing truer measures for work effort and the physical and mental effects of job assignments and job speeds on workers, such tools as time studies may be used effectively with labor's assent and full participation. The arbitration process can aid in achieving this purpose by guiding local labor and employer groups in meeting their problems and by resolving deadlocks occurring on matters of procedure and judgment.

THREE HIGH PURPOSES

We can lose this war only if we slow up our efforts or if we waste our ammunition sniping at each other. Here are three high purposes for every American:

1. We shall not stop work for a single day. If any dispute arises we shall keep on working while the dispute is solved by mediation, conciliation or arbitration—until the war in won.

2. We shall not demand special gains or special privileges or advantages for any one group or occupation.

3. We shall give up conveniences and modify the routing of of our lives if our country asks us to do so. We will do it cheerfully, remembering that the common enemy seeks to destroy every home and every freedom in every part of our land. (President Roosevelt, in his Washington's Birthday (1942) Report to the Nation.)

THE LAWYER'S STAKE IN ARBITRATION

OPPOSING COUNSEL VIEW AN ARBITRATION PROCEEDING

Two lawyers in Syracuse recently participated in their first arbitration proceeding. It involved defense material and was of importance to the war effort.

The two articles that follow were written by opposing counsel at the close of the hearing and before the arbitrators had made their award. They describe a typical proceeding under the Rules of the American Arbitration Association. [ED.]

CARL E. DORR *

A COUPLE of months ago a copy of "Arbitration in Action" came to my desk. While I then had what one might call the average lawyer's feeling that arbitration is often a desirable way of disposing of controversies, I also had certain mental reservations, in common, I suspect, with many of my profession.

Now I rather feel that the average lawyer is no different than the average of any other class of people in one respect—he does not spend too much time in analyzing such a thing as his own mental reservations. If the lawyer with a background of experience in court work and with some mental reservation as to the desirability of arbitration, were to analyze fully his own particular attitude, I venture to say that the reservation would boil down to nothing more than hesitation—another way of saying that, having lived in the legal atmosphere of a court room for years, he distrusts a procedure which permits, for example, hearsay evidence (which is anathema in the court room) or the reception of documents not always material to the issue.

Our methods of legal procedure are under constant bombardment. Congress enacted the Wagner Act. Under that and other authorized methods, legal rules as to the reception of evidence are often discarded. These are dangerous encroachments upon a field which has been under construction for ages and which represents the highest endeavors in straight thinking.

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On the other hand, we members of the bar must admit, with the great Judge Cardozo, that the law should progress in step with the times. We should seek to better conditions and not take the attitude that just because we have always had a given condition, that condition should perforce continue.

So when I approached the recent proceeding before three arbitrators selected from the Panel of the American Arbitration Association, I endeavored to eliminate from my mind whatever of reservation or hesitation I may have had. In short, I said to myself: "This is something brand new to me. It must have some merit when 7,000 business and professional men all over the United States offer their services without compensation, to people in controversy. I intend to give it a fair trial."

The proceeding has now progressed to the point where the evidence is closed and briefs submitted. Within the next 30 days, I am told, the arbitrators will hand down their decision. My outstanding impressions were these:

First: The uniform courtesy extended to litigants and counsel through three days and evenings of trial. Instead of starting at 10 A.M., working until 12:30 P.M., resuming at 2 P.M. and recessing for the day at 5 P.M., as is the customary court procedure, we began at 9 A.M., worked until 12:45 P.M., with one or two ten-minute recesses, adjourning for lunch, resuming at 2 P.M. and continuing until 5:30 P.M., when we adjourned for dinner, resuming at 7 P.M. and continuing until 10 P.M. These were long, hard days, but we took a vast amount of evidence in a complicated controversy. Through it all, the patience of the arbitrators never faltered nor did their courtesy diminish.

Second: The qualifications of the arbitrators. Intricate questions of bookkeeping, cost accounting and manufacturing costs were involved. One arbitrator was an accountant, the other two were manufacturers. They understood the technical language of the witnesses and they did not require the expenditure of time which a Judge and jury would have required to enable them to get at the facts.

What I have pointed out might be paraphrased or translated into this characterization—speedy comprehension of the issues, coupled with patience and friendly endeavor to get at the facts.

The case before a Judge and jury would have taken at least two weeks, probably three—if tried before a Referee, not less

than a month. Perhaps the Judge or Referee would, at the end, have known what it was all about, especially if either had ever worked in a toolshop or as an accountant. The jury never would.

In this particular controversy the character, ability and courtesy of the arbitrators, the speed with which the matter was submitted and the cooperation of the able counsel who opposed us made it a most pleasant experience for me and my client. I doubt if my opponents and myself ever left a court room with a greater sense of satisfaction as to the treatment accorded us, as to the evident comprehension by the tribunal of the entire situation and as to the very apparent determination by that tribunal to render a just verdict.

Such arbitrations have not yet become common in up-State New York. In our larger counties the calendars are heavy. Courts very properly dislike long trials for many reasons. Trials before Referees often are unsatisfactory.

I do not think that arbitration would be wise in all cases, but very many of them could be arbitrated with great satisfaction and saving to litigants. The bar has no need to worry that their services will not be required. They will be welcomed, if my experience is any criterion. At the same time the litigant who has no funds with which to employ counsel, or even the litigant who desires to try his own case, may do so. This is a distinct contribution to public service, because very often lack of funds or distrust of the legal profession deprives people of the opportunity to procure what is their due.

Finally, I must say, as a result of my first experience, that I can heartily recommend arbitration as highly desirable in very many cases and I am especially glad to recommend the procedure of the American Arbitration Association.

ROBERT E. DINEEN *

I have just completed my first trial in an arbitration proceeding conducted by the American Arbitration Association.

It involved a dispute between two concerns engaged in making parts for an anti-aircraft gun. The president of one of the concerns had resorted to arbitration on a prior occasion and was so favorably impressed by it that he persuaded my client to sign an

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agreement to arbitrate before I was consulted. Although I had never had any experience in an arbitration proceeding before, my initial impression was that my client had made a mistake in agreeing to submit the dispute to arbitration. The matter involved approximately $90,000.00, and with that amount of money at stake I felt that the rights of the parties should be determined in a formal legal proceeding such as an action in the Supreme Court, rather than in the informal manner usually employed in arbitrations. My client having actually signed the agreement to arbitrate, I was compelled to lay my objections aside and proceed with the arbitration. The subsequent developments demonstrated that my fears and objections to arbitration were groundless, and I am now convinced that it was I who was mistaken, not my client.

In many arbitration proceedings, each side selects an arbitrator and the two arbitrators select a third. Every lawyer is familiar with the demerits of this procedure. Although the man picked by each side is labeled an arbitrator, the term is a misnomer. He is actually an advocate. Frequently, an appalling amount of time is lost while the first two arbitrators haggle over the selection of the third, each bent on foisting upon the other a hand-picked third arbitrator. The result is that while the proceeding may actually be tried before three arbitrators, there is really only one. This undesirable situation was completely absent in the proceeding which we conducted under the Rules of the American Arbitration Association. In our case, each arbitrator was an arbitrator in fact as well as in name, and each made a definite contribution to the case.

On the day that we first met to conduct the arbitration, I was very agreeably surprised by the caliber of the three arbitrators. It was evident that they were men of a high order of intelligence and absolute integrity. Our dispute involved, among other things, technical phases in the machining of parts and an audit. Two of the arbitrators had a wide experience in machine shop practice, and the third was a certified public accountant connected with a nationally known firm of accountants. No time was lost, therefore, in "educating the Court"; indeed, they knew more about the subjects involved than the lawyers who were trying the case. Their unusual qualifications had a salutary effect upon the witnesses; the witnesses evidently realized that the arbitrators could

not be "taken in," and most of them bent backwards in an effort to present the facts exactly as they were.

In the course of the proceeding it was necessary to introduce in evidence over 100 exhibits. Any trial lawyer knows that the introduction of documentary proof is a time-consuming task in the usual legal proceeding. In this proceeding, because the rules of evidence were not followed, a tremendous amount of time was saved in placing the documentary proof before the arbitrators. Upon several occasions, witnesses gave conflicting testimony as to some phase of the case. In an ordinary lawsuit, no effort is made to reconcile these conflicts; each witness stands on his own version of the matter, and it is left for the trier of the facts to decide where the truth lies. In this proceeding it was possible, because of its informal nature, to reconcile many of these differences, thereby eliminating uncertainties from the case.

The most impressive feature of the proceeding was the speed with which it was accomplished. We tried a complete case in three days, which, in my opinion, would have required at least two weeks to try in a regular court proceeding, and possibly longer. Due to the rapid expansion of my client's business, he was badly in need of working capital. He felt that he was entitled to receive an award and pointed out that if he had resorted to the courts instead of to arbitration, his case would have had to await its turn on the trial calendars in our County, which are becoming markedly congested due to the increase in automobile liability cases resulting from the enactment of the new financial responsibility law. He said that even if the arbitrators rejected his claim, it was at least an advantage to him to know promptly where he stood. In my opinion, at least a year would have elapsed before his case would have been reached for trial. My client pointed out that in view of his financial condition, a delay of that length of time would have been fatal. Under arbitration, and allowing time out while the parties were awaiting the completion of the audit, the action was tried and disposed of in approximately a month.

The lawyers and witnesses were treated with the utmost courtesy by the members of the Board, and when the hearing was over I was satisfied that both sides felt that the arbitrators had approached their task in a judicial spirit and would hand down a decision as fair and as equitable as it was humanly possible to do.

To use the vernacular, the whole proceeding was an "eye opener" to me. I never realized that so much could be accomplished in so short a time and done so well. This proceeding made a convert out of me. I do not believe that arbitration will ever be a complete substitute for our courts, and I know that there are certain types of cases which I would prefer to litigate in the regular way. On the other hand, it is apparent that there are any number of proceedings, such as the one which we have just completed, which are admirably adapted to arbitration.

ARBITRATION BENEFITS THE LAWYER

LIONEL S. POPKIN *

LAWYERS recognize many benefits and advantages to themselves from arbitration. Lawyers have supported arbitration laws in the legislatures of various States. Without the support of lawyers in those legislatures the enactment of arbitration laws would not have been possible.

Due in large part to the ancient view of the courts that arbitration deprived them of jurisdiction (a concept long since abandoned by the courts), an erroneous impression still persists among some members of the Bar that arbitration is harmful to them. The writer of this article, having had direct contact in the field of arbitration in scores of arbitration proceedings as trial counsel and as arbitrator, can speak from experience: arbitration aids and benefits the lawyer in many ways—its disadvantages to him are negligible.

In practically every arbitration involving either a substantial amount of money or a question of principle, lawyers are employed by the parties to represent them and to try the controversy before the arbitrators. In every case where the writer has sat as an arbitrator, each party has been represented by counsel, and in the numerous controversies concerning which he has been consulted and which were submitted to arbitration by clients, the clients have been represented by counsel. It is estimated by the American Arbitration Association that in 80 per cent of the

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arbitrations conducted under its Rules, both parties are represented by lawyers as trial counsel. The remaining 20 per cent consist of controversies involving small and inconsequential amounts, in which the lawyers would not be adequately compensated if they were paid the full amount involved in the controversy. While businessmen are permitted to try their own cases before arbitrators, experience shows that clients prefer lawyers to represent them in arbitrations, just as they require lawyers in the courts. There can be no question that lawyers are engaged to try every arbitration proceeding which warrants any fee commensurate with the time and effort expended by the lawyer—in other words, in those controversies where lawyers are not engaged, the lawyers themselves would prefer not to handle the matter because it would be unprofitable for them to do so.

Every lawyer knows that in connection with any controversy he is paid, by and large, on the basis of the amount involved and the result achieved—not on the basis of the time and effort expended on the matter. It is the experience of the writer that a fee every bit as large may be charged and collected without question by the lawyer for an arbitration as contrasted with a lawsuit, regardless of the fact that the time and effort expended in an arbitration is only a small fraction of the time and effort expended in trying the same matter in court.

In an arbitration the controversy is set down for hearing within several weeks after notice to the American Arbitration Association or to arbitrators acting under the Rules of some other association or acting independently of the Rules of any such association. A definite time is reserved for the particular arbitration and the parties and their counsel know that at that time the controversy will be heard. Because arbitrators are not bound by the rules of evidence and because parties are permitted, before arbitrators, to tell their story and the facts in an informal fashion, a controversy may be tried before arbitrators in anywhere from one-fifth to one-tenth of the time required in court. Moreover, all of the time and energy consumed in preliminary motions addressed to the pleadings, examinations before trial, appeals and the numerous other steps required in a court action are saved in an arbitration, giving the lawyer that much more time to devote to his remaining practice. Furthermore, in connection with an arbitration, the lawyer is spared the waiting

required in connection with motions and the trial in court, when of necessity he must wait his turn.

Since arbitration is expeditious, the lawyer may dispose of the matter completely in several months from the time when he is first retained and thus collect his fee expeditiously, instead of a year or two years after he is retained in connection with a lawsuit.

From the standpoint of the lawyer, as well as from that of the client and the witnesses, there is not only the saving of time but also the added element that it is so much easier to obtain the necessary evidence and to try the case before arbitrators within a short time after the controversy arises, when the evidence is available and the matter is fresh in the minds of the witnesses; as contrasted with the lawsuit which may not be tried for a year or two years after the dispute arises and where the witnesses may not be available or their memories may not be clear as to the facts.

Furthermore, the chances of collecting a claim are far greater immediately after the controversy arises than a year or two thereafter, when the ability of the defendant to pay the claim may have been very much lessened. The instances are all too frequent where a lawyer has worked for a year or two on a case, finally gone to trial and obtained a judgment, only to be confronted with the fact that the defendant who was solvent when the controversy arose has since become insolvent or somehow disposed of his assets or placed them beyond the reach of creditors.

Thus, the conclusion expressed at the beginning of this article that "arbitration aids and benefits the lawyer in many ways" is substantiated. Those advantages are as follows:

1. The lawyer is retained to represent his client in any worthwhile arbitration.
2. The lawyer is compensated at a much higher rate for time spent in an arbitration than in a court action.
3. The lawyer saves a vast amount of time in handling an arbitration as contrasted with handling a court action.
4. The lawyer's convenience is served in an arbitration proceeding in that his case is set for trial and tried at a time specially reserved for his arbitration.
5. The lawyer may completely dispose of an arbitration in several months from the time when he is first retained, whereas a court action may not be disposed of for one or two years, thus assuring the lawyer: (a) that he will collect his fee expeditiously, (b) that the evidence and

the witnesses will be available, and (c) that the defendant will not be able in the delay of one or two years necessary to obtain a judgment in a court action, to dispose of his assets and frustrate collection of the claim.

ARBITRATION SERVES BOTH LAWYER AND CLIENT

DONOVAN O. PETERS *

EXPERIENCED lawyers are usually of the opinion that they can best serve their clients and themselves as well, by keeping their clients out of court. There are good reasons for this opinion. Bar associations are cooperating with State Legislatures to revise and improve our court procedure, but progress is very slow. People are reluctant to change customs that have been established for many generations. For example, many people are actually shocked if any doubt is expressed concerning the value of the jury system in modern times. However, the number of cases submitted on trial to judges without a jury is steadily increasing. There is a growing clamor for simplification of court procedure.

If lawyers truly desire to keep their clients out of court, it seems to be a reasonable suggestion that we should attempt to discover or develop some means for the adjustment of controversies, at least those in which both parties have an honest difference of understanding, by a hearing on the merits. This should be possible without the necessity of compromise, appeasement, abandonment or other sacrifice as the price of staying out of court. No one enjoys surrendering his rights without a hearing. Everyone should have an opportunity for his case to be heard and decided on the merits. It is not fear of the courts that influences us to avoid them, but it is sound business sense to eliminate waste in all business transactions, and this applies to the unreasonable waste of time and expense in litigation.

With that idea in mind, lawyers and clients alike are to be criticized if they neglect to give careful study to arbitration as a practical means consistent with the desire to avoid many of the objectionable features of court procedure.

Lawyers are, as a general rule, unfamiliar with the enabling statutes providing for the arbitration of disputes. This unfamiliarity is possibly one of the principal reasons for the hesitancy in advising clients to submit their controversies to arbitration or

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to insert enforceable arbitration clauses in their contracts in those states where arbitration statutes have been enacted similar to the New York model.

The members of our legal profession seem to prefer the more familiar intricacies and technicalities of the courts, without making serious inquiry into the possibilities of arbitration under the Federal statute and laws in many states enacted in recent years. Are we of the legal fraternity in a rut, or are we suffering from a widespread epidemic of *stare decisis*, aggravated by inertia, in that we look only to formal and stilted court procedure for relief? Perhaps our apparent disinclination to analyze arbitration procedure is traceable to the circumstance that our experience as legal advisers has been limited more or less to the familiar legal rules and spit-balls of the courts. We patiently suffer the delays of congested court calendars, time-wasting pleadings, expensive depositions, court costs, inconvenient trial dates, and similar aggravations. But are we so accustomed to these and many other objectionable points of court procedure that we are unwilling to investigate and try arbitration as a means for improvement pending statutory relief?

Obviously, arbitration is not a cure-all, but anything that holds out a promise of some immediate relief from many of the practical difficulties in the determination of disputes by hearings on the merits should meet with more than merely a polite approval or passive acquiescence by lawyers. It deserves an aggressive and affirmative move by lawyers to place the time-saving, labor-saving and expense-saving machinery of arbitration into active and more frequent use. If any lawyer or layman can suggest a valid reason for rejection or even a mere passive interest, which amounts to the same thing, in arbitration, that objection should be offered openly for an honest analysis.

The layman may have good reason to accuse lawyers of being selfishly afraid of arbitration as a threat to their law practice. History demonstrates that similar objections to the introduction of labor-saving modern machinery, based on fear that increased unemployment would be caused, have been proven unfounded. Such fear by many lawyers, if any fear really exists regarding arbitration, is equally unfounded.

Arbitration carries with it a real need for a party to be represented by legal counsel. This need of legal guidance is not caused by any complex technicalities in arbitration, but exists because

lawyers, through their special training and experience, are more skilled in the clear and concise presentation of probative evidence to the end that the arbitrator or arbitrators will not be confused but will understand and give due weight to every phase of the controversy which might favor a client.

A party in an arbitration, acting without counsel, might suffer from an inadequate or a clumsy presentation of his case, to the same extent as if he went into court without counsel.

It seems probable that a more frequent use of arbitration will bring greater recognition of its possibilities and advantages with the result that disputes will be arbitrated which would never be litigated. It follows that the amount of legal business will grow and be more expeditiously handled.

Many times a client will consent to a compromise to avoid a speculative court trial. However, arbitration is not a procedure for compromise. It provides a hearing on the merits. Obviously the award is a matter of uncertainty to the parties, but not any more so than a judgment after a court trial.

Compare a few of the chief uncertainties of a court trial with those of an arbitration.

If a jury is demanded in a trial, there are twelve jurors who are not familiar with court procedure and legal technicalities. Lawyers are disqualified as jurors. The untrained laymen selected as jurors are expected to exercise trained discretion and listen only to evidence on questions of fact. They must "tune out" all questions of law, even though there are often very fine and obscure distinctions between the two classifications of evidence. The jurors, although having the best of intentions to the extent of their training, constitute twelve uncertainties for each party litigant. The judge alone determines questions of law and attempts to instruct the jurors on the law in a brief and learned statement of rules of law that are often confusing to laymen. Reversals on appeal from erroneous instructions are not uncommon and the judge is the thirteenth uncertain quantity.

These uncertainties are of common knowledge and attorneys who may read this discussion will be reminded of other uncertainties in court procedure too numerous to mention.

Compare the particular thirteen uncertainties mentioned in court procedure with those involved in an arbitration. The arbitrator or arbitrators mutually selected by the parties constitute both judge and jury. Instead of twelve jurors drawn by ballot

from a panel of tax payers, an arbitrator is nominated by both parties for his special qualifications to consider the merits of the particular subject-matter in dispute. The parties select their own arbitrator because they have confidence in his ability to decide the case without bias, politically or otherwise.

It may be properly contended that in litigation both parties can waive the jury and submit both the law and the facts of the case to the judge, as in equity cases. However, the judge is not the personal choice of the parties. The judge is not selected for his knowledge of the particular type of case or technical subject-matter. He may have a general knowledge of the subject in litigation, but he must be educated intensively at the trial if it happens to involve engineering, medicine or chemistry, special trade practices, or other specialized field in which the judge's knowledge is as limited as is that of the average layman.

Assuming that the parties in the case desire a determination of their rights after a fair and honest hearing on the merits, and without resort to technical strategies, it seems obvious that insofar as the lower court trial is concerned, at least one-half of the cases now cluttering the trial court calendars in most jurisdictions would be determined more quickly and satisfactorily by an arbitrator who is mutually chosen by the parties for his qualifications to consider the particular type of problem in question.

The lawyer who leads his client through an arbitration can earn his fees and cement a closer professional contact with his client's business affairs than is possible in the exhausting and (for the client) fearful complications of court procedure.

Attorneys will sometimes argue vaguely that many cases involve such close questions of law that arbitration would not be suitable. Without minimizing the ability and qualifications of judges in our trial courts, how many times is a judgment acceptable to a losing party and his attorney? The large percentage of reversals on appeal from judgments of the trial court attest the fact that judges are not infallible and that a good lawyer acting as an arbitrator may be equally skilled in the application of rules of law as a good judge. If this is true, it merely suggests that where difficult questions of law are involved, the arbitrator mutually selected by the parties should be a lawyer. Fortunately good lawyers have been found available to serve as arbitrators, as shown by the records of the American Arbitration Association. In this connection, much can be said in favor of selecting legally

trained arbitrators in all arbitrations excepting those which require specialized knowledge of trade customs or scientific or other technical subject-matter in the controversy.

Everything considered, it seems clear that as arbitration becomes more generally used in the business world, it will broaden the scope of the legal profession by developing a closer and more frequent application of the services of attorneys to the everyday business matters of a larger clientele. This can be accomplished by making it easier, and less expensive for clients, through arbitration, to have business differences determined after a short hearing on the merits instead of by compromise and appeasement to avoid litigation.

A further matter worthy of consideration is the advantage of arbitration in disputes between parties who reside in different cities, states or countries. One of the first questions to puzzle the lawyer on behalf of his client is whether he will be given a fair and impartial hearing in the court of a foreign jurisdiction. What kind of a judge will hear his case? Will the judge intentionally or unintentionally favor the local party or his counsel as against a party from another jurisdiction? Should local counsel be associated in the case for possible local goodwill or appearances? What should be the local attorney's share of the fee? Who should be selected as local counsel to avoid the possible hazard of any prejudice in favor of the local party which might exist in the minds of the judge or jury? Such are a few of the lawyer's usual questions in preparing for trial.

On the other hand, if the party and his attorney in the other or foreign jurisdiction are in good faith and desire only a fair and impartial hearing on the merits without any of the circumstantial advantages mentioned, the mutual selection of a disinterested and unbiased arbitrator would be a simple matter. The time and place of hearing could be promptly set to suit the convenience of both parties and their attorneys, without the aggravating and tedious court pleadings by demurrer, motions to strike and the like, requiring attendance in court for argument at times arbitrarily fixed by the court, with the usual waste of time waiting for the motions ahead on the calendar to be heard.

Parties do not waive any right to a fair hearing by submitting a cause of action to a legally trained arbitrator where questions of both fact and law are involved. Nevertheless, any party who has gone through an arbitration finds that in the average case

he needs a lawyer at his side for the same reason that he needs a lawyer to advise him in the drawing of an important business contract. The contract is in the English language, but the legal experience of a lawyer has made him more skilled in the use of words to express ideas to avoid legal ambiguities.

Arbitration is the legal profession's best means for service to the public in the handling of labor controversies, as well as in commercial and general business disputes, while waiting for our respective state legislatures, as well as Congress, to act upon the constructive recommendations for revision and greater uniformity of court procedure that are being developed and offered by Bar associations throughout the United States.

HIGH COST, SMALL CLAIM

Lawyers should respect the public's financial interest in the judicial branch of government, Judge Russell C. Hardy of the fourth division of the Wyandotte County District Court declared, in refusing to impanel a jury to try a case involving $36.

Judge Hardy was about to ascend the bench for a jury trial when he asked plaintiff's attorney how much money was at stake. He was advised the amount, based on a rent claim, was $36.

"Wait a minute," Judge Hardy said. "I'm not going to call a 12-man jury to try such a case. The services of the jurors alone would cost the county $36 a day."

The plaintiff's counsel insisted on a jury trial, but Judge Hardy remained adamant, saying the case should be settled out of court. "It has been estimated that a trial costs $100 a day, including services of the court, stenographer, clerk, bailiff and the possibility of serving subpœnas on witnesses by sheriff's deputies," Judge Hardy said.

A few minutes later the case was settled for $11.

WARTIME REPORT OF THE INDUSTRIAL ARBITRATION TRIBUNAL

SINCE the last report of the Industrial Arbitration Tribunal was issued, at the close of its third year of activity, arbitration has changed from a defense measure to a war measure. War has been declared, industry has gone on an all-out production basis, factories have changed overnight from peacetime to war production, collective bargaining agreements are being written in ever increasing numbers, and a greater unity has resulted in a lesser number of strikes.

The menace of disputes between management and men has been recognized for the serious danger it is, and arbitration has gone into action, on a priority basis, on every industrial front in the United States.

One of labor arbitration's outstanding accomplishments in this period is that it has escaped the dangers of compulsion and has emerged to remain the same voluntary, self-regulatory, private proceeding it has always been in this democracy. Its priority status as a civilian measure is established by no less an authority than the Executive Order of President Roosevelt which created the National War Labor Board. That Order gives precedence to voluntary procedures for settling disputes which may be adopted by the parties or provided in their collective bargaining agreements. Only after these have been tried and exhausted will the Government, through the War Labor Board, take jurisdiction in a dispute that threatens to affect war production.

Both management and labor have taken this priority seriously. Arbitration provisions are being written into more labor agreements and arbitration tribunals are working overtime to keep disputes from disrupting production or opening seams to dissension and disunity in industrial relations.

The last report (1940) of the Industrial Arbitration Tribunal recorded a steadily consistent growth and expansion of the facilities of the Tribunal, but with the stepping up of the defense program and the eventual declaration of war, industrial arbitration far outstripped all previous records. In the first three months of 1942, for example, the number of labor disputes submitted to

the Tribunal showed an increase of 106 per cent over the corresponding period of 1941, and problems arising out of war conditions constituted a marked proportion of the new questions submitted to arbitration during the year.

Until 1941, industrial arbitration and other activities of the Association were carried on at long range, all proceeding and directed from the New York headquarters. "Full speed ahead" to the Association's war arbitration activities was signalled early last year, when arbitration centers for both commercial and industrial arbitrations were established in thirty key cities. This expansion was possible through the generous cooperation of the motion picture producers, with the approval of the Department of Justice, in placing at the disposal of the Association the facilities of the Motion Picture Arbitration System, maintained by the producers at a cost of more than $300,000 annually. Without this cooperation the Industrial Arbitration Tribunal could not have rendered the widespread service which this report records.

BACKGROUND OF TRIBUNAL

Behind the establishment of the Industrial Arbitration Tribunal is fifteen years of research, organization and experience gained from conducting commercial arbitrations in the United States and later in inter-American trade relations.

When, in 1937, a number of Unions asked the Association to administer arbitrations arising out of their labor contracts, the Association sought the advice of an Advisory Council, representative of labor, management and the public, whose guidance it followed in setting up the Industrial Arbitration Tribunal, formulating Rules of Procedure, determining questions of policy, administration, etc.

FACILITIES

The expanded facilities of the Tribunal now include:

A central administrative headquarters in New York City.

Thirty branch Tribunals, located in as many important trade centers in the United States, each equipped with a staff, hearing rooms and other facilities, operating as units of a national system of arbitration.

Standard Rules of Procedure and a standard practice, devel-

oped over a long period of years, which operates in the same manner wherever it is called upon.[1]

A National Panel of Arbitrators, distributed over approximately 1600 cities, having special qualifications to act in labor disputes and whose impartiality and integrity are beyond question. First, they are put on the panel only after careful investigation; second, the parties have the right of choice and may investigate an arbitrator's record before accepting him; third, there exists the right of challenge during a proceeding, under which an evidently biased arbitrator can be removed and the vacancy filled.

These voluntary industrial arbitration facilities supply the nation with a self-regulatory system of arbitration and a choice between voluntary civilian services such as are contemplated by the President's Executive Order and official government facilities.

They provide rules and regulations and a technique by which parties can dispose of their own disputes with a minimum of delay and cost and with no publicity.

WARTIME LABOR ARBITRATION CLAUSES

With the priority given to voluntary processes of adjustment and arbitration by the President, there resulted a greatly increased demand for information concerning provisions for voluntary arbitration in labor contracts. To meet this need, the Association issued a series of Wartime Labor Arbitration Clauses, prepared after consultation with a group of Impartial Chairmen serving more than twenty industries in New York, which it recommends to any parties to labor agreements who voluntarily undertake to arbitrate under the Rules of the Association.[2].

Alternate clauses are presented for use under different circumstances, and include the following:

1) General arbitration clause; 2) General combination clause for mediation and arbitration; 3) Alternate clause when each party appoints an arbitrator and the two arbitrators appoint the third, or, upon their default, the Association appoints the third arbitrator; 4) Special clause for the adjustment of economic inequities arising out of the war during the life of the agreement;

[1] A copy of *"Industrial Arbitration Tribunals"* containing these Rules will be sent upon request, without obligation.

[2] Pamphlet containing this series of clauses may be obtained upon request.

5) Special clause to provide for the renewal of a labor agreement; 6) Special clause for making of inquiry when only facts are in issue; 7) Special clause defining the powers of impartial chairmen when they are to be appointed by the Association.

GENERAL PRINCIPLES

The Tribunal is an entirely non-official, non-partisan, non-profit making agency providing facilities for the adjudication of labor disputes. It offers these facilities on precisely equal terms, under equally fair conditions, to both management and labor.

The Tribunal maintains a panel of arbitrators chosen solely for their integrity, impartiality and competence, from which the parties select the arbitrators who will hear and determine their dispute.

The Tribunal is wholly voluntary, in that parties, of their own volition, elect to use its facilities, either through arbitration provisions in collective bargaining agreements or submission agreements entered into after a dispute arises.

The Tribunal does not function as a negotiating or mediating agency for, under its Rules, these conciliatory processes, through the efforts of the parties or other agencies, must have been exhausted or failed before a board of arbitrators will be convened.

The Tribunal is not a permanent board of arbitrators to hear any or all cases. It is a mechanism by which a board of arbitrators is selected for each case in accordance with the expressed wish of the parties. The Association, itself, is not a tribunal, has no judicial powers and does not assume any of the functions of an arbitrator. It maintains the machinery out of which parties create tribunals, and the arbitrators chosen by them have sole jurisdiction under the Rules over the proceeding, and they decide the issue on the basis of evidence submitted at hearings.

The Tribunal's Panel of Arbitrators act in a voluntary capacity and receive no compensation unless the parties and the Arbitration Committee specifically, in each instance and for particular reasons, authorize it.

The Tribunal's objective is an award rendered on the basis of evidence presented by the parties and one that is enforceable under the prevailing arbitration law and that has the effect of a judgment of the court when and if the parties seek such enforcement.

COST

As the Tribunal is not run for profit and as its arbitrators serve without remuneration, the nominal fees paid by the parties are intended to cover only the actual cost of administering the proceeding. The fees are: $15 paid by each party for the first hearing, and $10 for each additional hearing. In a majority of the cases one hearing is sufficient to dispose of a matter.

RECORD

The number of cases referred to the Tribunal—a total of 721 to December 31, 1941—is topped in importance by the fact that only in less than 2 per cent of the cases has there been a refusal by either side to abide by the arbitrator's decision or an attack upon the award in the courts, and in no case has a court reversed an award.

The Tribunal has thus answered, by practical experience, one great question that troubled management and labor leaders alike: Will the unions abide by the awards? The answer is: Yes, when they obtain a fair trial, have equal opportunity to be heard, and receive an impartial award based upon the facts.

The number of employees involved in cases submitted has ranged from a single employee to 11,000 workers in one controversy.

EXPANSION IN SCOPE

When the Tribunal was organized four years ago, it served mainly the metropolitan area of Greater New York and a half-dozen nearby cities. But as knowledge of its activities spread and its reputation for impartial and disinterested administration of arbitration grew, so also did the scope of its activities. Another reason for this growth was the opening of branch Tribunals in leading industrial centers, providing local facilities which are available the instant a dispute arises. In 1941, arbitrations were conducted in scores of cities distributed over fourteen states: New York, California, Connecticut, Illinois, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Washington and West Virginia.

EXTENSION IN USE

The organizers of the Tribunal realized in the beginning that the success of the Tribunal and the measure of its usefulness to management and labor would depend upon its acceptance by

unions and their willingness to include in their collective bargaining agreements, clauses providing for arbitration under the rules of the Tribunal.

From the small group of unions that used the Tribunal's services in its first year, the number had grown to 115 at the end of 1941. Among the unions that have called upon the Tribunal for services are the largest industrial groups of both the CIO and the AFL, such as the United Mine Workers of America; Textile Workers Union of America; United Electrical, Radio and Machine Workers of America; International Brotherhood of Teamsters and Chauffeurs; International Brotherhood of Electrical Workers; American Federation of Radio Artists; Amalgamated Clothing Workers of America; Bricklayers, Masons & Plasterers International Union; National Maritime Union and Steel Workers Organizing Committee. A list of the Unions that have used the facilities of the Tribunal may be obtained upon written request.

In some instances, initial use of the Tribunal's services by a Union has been followed by a policy of providing for arbitration under the auspices of the Association in all labor contracts of that particular group. For example, the Textile Workers Union of America recently advised the Association that the Industrial Arbitration Tribunal had been named in 114 contracts between the Union and textile mills in various parts of the country; the American Federation of Radio Artists likewise has named the Tribunal in contracts with more than one hundred radio stations.

WARTIME QUESTIONS

The impact of war conditions, conversion of industries and the speed-up of production have been reflected in the type of questions that have come to the Tribunal for adjustment in recent months. Disputes involving increased costs of living and wage adjustments, shortage of goods and the effect of priorities on labor contracts, basic crews and work assignments, changes of policy, continuous operation of plants and effect on overtime pay, flare-ups among workers of different national backgrounds, are among the matters referred to arbitration. During the year the Tribunal received its first case arising out of a jurisdictional dispute between two CIO unions, and also the first matter which arose out of the effect on wages and working conditions of shortage of raw materials caused by Government priorities on rubber.[3]

[3] A summary of more than a hundred of the typical questions arbitrated will be sent upon request.

In one matter, submitted by a southern cotton mill and the Textile Workers Union of America, the arbitration concerned the question of work loads. The decision of the arbitrator, a man thoroughly experienced in work assignments and time studies in textile mills, is expected to create a formula that may be followed throughout the textile industry in the south.

GUIDEBOOK TO ARBITRATION

In 1941, industrial arbitration was furnished with its first guidebook. Projected for years, the need for it became imperative in the rapid expansion of labor arbitration, and *Arbitration in Action*,[4] a code for civil, commercial and industrial arbitrations, was written. Its purpose is to offer a short cut to information on how, when and where to arbitrate, the technique of arbitration and how to use it to best advantage. It undertakes to set forth principles and standards of law and practice and a way of proceeding under them, so those actively engaged in industry and commerce need not take the time to hunt for the information or go blundering along looking for the answer.

USEFULNESS OF TRIBUNAL IN WARTIME

With its widespread arbitration machinery in 1600 cities and thirty branches, its Panels of qualified arbitrators, its reputation for impartiality and its acceptance by both management and labor, the Industrial Arbitration Tribunal is in a position to render an unlimited service of vital importance to a nation at war.

Like the Minute Men of our first war, arbitration is ready to go into action on a moment's notice. There is no need to train new men as arbitrators—qualified ones are always on call. No valuable time need be lost in setting up machinery—it is ready and waiting only for the call of disputants to put it in operation. There is no danger of a haphazard proceeding defeating the desire of the parties to arbitrate—the procedure is standardized and carefully supervised by experts. Arbitration is ready for action in every war production center, in the vicinity of every plant engaged in producing war materials, and in every community, large or small, where disputes are likely to arise. Operating at

[4] *Arbitration in Action*, by Frances Kellor, First Vice President of the American Arbitration Association, published by Harper & Brothers, New York (412 pp.).

scheduled fees, the costs of using this arbitration machinery are at all times subject to the control of the parties.

Voluntary arbitration under the Tribunal's Rules and a civilian system means fewer delays, lower costs, quicker decisions, expert arbitrators, non-partisan, non-political, non-profit-making proceedings, avoidance of harmful publicity helpful to our enemies, elimination of red tape and legalistic rules, understandable procedure and the right of parties to select their own arbitrators and conduct their own proceedings.

The Tribunal provides our nation at war with a new instrument of protection which did not exist during the last war. It offers to management and labor a wider use of labor contracts that include arbitration provisions, putting industrial relations on a solid foundation of agreement, in place of the quicksands of discord. It offers insurance against the delays, waste and obstructions to production. It makes possible a new war slogan: "We fight against our enemies abroad, but not among ourselves at home."

"THE VOICE OF LABOR"

The best labor brains of the State Mediation Board, a union and a New York shiploading concern were arguing futilely today in an effort to end a defense strike, when out of a crowd of longshoremen came a handy solution to the problem.

"Hell, this ain't no tea party," a longshoreman shouted. "This is war! Let's all shake hands and go back to work."

The simplicity of the plan amazed the conferees, who, in a dockside conference witnessed by the workers, had become enmeshed in complicated compromise proposals. Everybody promptly laughed, shook hands—and this afternoon 258 stevedores were back at work again, with only a few hours of time lost. (From the *New York World-Telegram*, March 21, 1942.)

WAR LABOR BOARD LOOMS AS LABOR "SUPREME COURT" *

BENJAMIN WERNE †

THE single most powerful agency in the field of labor relations today is the War Labor Board. Originally created to supersede the National Defense Mediation Board, it has in the four months of its existence become a factor to be reckoned with by all industry—not merely that branch which is engaged in war production. This is particularly significant since its jurisdiction is in reality supplementary, not original; that is, the War Labor Board seldom acts on its own initiative but intervenes when all other means have proved unsuccessful. This is best illustrated by the recent elevator strike in New York and by "Little Steel's" appeal for wage increases.

OTHER AIDS MUST BE EXHAUSTED

Labor and management are expected to settle their disputes by recourse to the conventional medium of collective bargaining. If a dispute is not settled by the regular procedures of collective bargaining, the commissioners of conciliation of the Department of Labor are then notified. If such conciliation fails, the Secretary of Labor is required to certify the dispute to the War Labor Board, or the board may take jurisdiction on its own motion, after consultation with the Secretary.

The Board is then authorized to make final determination of the dispute through mediation, voluntary arbitration or arbitration, under rules established by the Board.

The President's executive order provides that nothing in the order shall be construed as superseding or in conflict with the Railway Labor Act, the National Labor Relations Act, the Fair Labor Standards Act and other existing labor legislation. In other words, the provisions of the Labor Relations Act protecting the right to organize and bargain collectively are still in full effect, as is the Wage-Hour Act and other protective labor legislation.

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† Analyst of Government Controls, International Statistical Bureau.

At all stages, the parties may agree voluntarily to a settlement or they may agree to arbitration. In the last analysis, when a case has reached the board docket, the Board may lay down its own decision or may prescribe that the parties submit the dispute to arbitration, possibly prescribing the scope and terms of the arbitration procedure.

Settlements may take various forms. Those which promise to be of the greatest significance are final determinations by the Board and awards made pursuant to Board orders that disputes be submitted to arbitration.

QUESTIONS OF POLICY

Questions on which the Board's final decisions will be watched most closely include those of union security in its many forms, criteria for changes in wage rates, controversies over the employment of women in jobs formerly performed by men, and adjustment of overtime, particularly where round-the-clock, seven-day operations involve Sunday work and union contracts call for penalty overtime payments for work on Sundays.

Techniques now in use include:

1. Prescriptions surrounding the arbitration which may well prove of equal significance with the awards themselves.

2. Settlements arrived at through mediation. Failing agreement, the cases will go for final settlement to the Board. Hence any proposal of the mediators which is in accord with decisions of the Board in comparable situations will carry added weight. The majority of all settlements will probably be informal agreements of this type in which there will be no formal decisions.

3. Interim settlement which, in its simplest form, is a requirement that the parties continue in the *status quo* until a final settlement is reached. It may extend, however, to the settlement of a considerable number of issues with the remaining issue or issues to be submitted to arbitration or to some other form of determination.

In his latest address to the nation, the President stressed his belief that the Labor Board could prevent general wage increases but may allow isolated increases in cases where the wage was considered substandard. Chairman William H. Davis, of the War Labor Board, lost no time in announcing that he re-

ceived from the President a "directive" to "stabilize the remuneration of wage earners" under a flexible policy of balancing the wage structure.

The War Labor Board, stemming as it does from a Presidential directive rather than from an Act of Congress, is in effect a Supreme Court of Labor Relations. It is felt that if Congress were to determine the nation's labor policy during the present crisis, such policy would be too inflexible, and might well be vulnerable to attacks against the board as having transcended the scope of its authority. On the other hand a policy announced by the War Labor Board may be as varied and flexible as the number of situations presented to it.

NO INFLEXIBLE POLICIES

"An inflexible policy," said Dean Wayne Morse, public member of the Board, "would, in a large measure, defeat its own ends. It may be that the work of the Board would be lightened by an enunciation of certain broad general policies which the government desires to have labor and employers follow during the war. Possibly the strengthening of the enforcement powers of the Board would assure its greater effectiveness in executing its functions. However, above all else, it is important that the Board should be kept in a position so that it can decide individual cases in accordance with the facts shown by the record of each case as it is presented to the Board. It seems to me that if the Board is to accomplish its primary purpose, namely, the peaceful settlement of labor disputes during the period of the war, to the end of promoting the maximum production of war goods—it should not be hamstrung by inflexible policies."

Accordingly the theory of the Board is that since both employers and unions have given up the use of economic weapons, they are entitled to fair treatment meted out in accordance with the judicial process of such an agency as the War Labor Board on the basis of evidence and not on the basis of any inflexible general policy which, in individual cases, might hamper rather than increase war production.

To date the Board has described in substance the methods of enforcing its decisions, procedure in considering North-South wage differentials, some criteria in deciding inter-union disputes, premium rates for night work, union security, division of work

between conflicting unions, compulsory union membership, closed shop, maintenance provisions and check-off.

On several of these issues the Board has taken a decidedly definite stand.

It holds it has jurisdiction to consider all labor disputes which might interrupt work contributing to the effective prosecution of the war, including disputes as to union status.

This is illustrated in the case of Federated Fishing Boats of New England and New York, Inc., & Atlantic Fisherman's Union, A.F.L. Case No. 16—*LRR* 688. In this, its first decision, the War Labor Board squarely considered its authority to assume jurisdiction over a dispute in the food industry. In deciding that it had such authority the board "solemnly" warned industry to accept its decisions and act accordingly.

LABOR DISPUTES

In this case, the employers refused to resume operations unless the Board would promise a decision in their favor—on one point—and declined to send to the Board's hearing a representative authorized to make a decision. In *deciding* in favor of the union the Board ordered that management must purchase war risk insurance (the proportion of the premiums to be paid by the employer and the employees being left for subsequent determination.)

In resisting the power of the Board, the employers claimed that fishing was not a war industry and, therefore, not subject to the War Labor Board's jurisdiction. The Board, in disagreeing with management, has announced its interpretation of the power conferred upon it. War industry is not to be confined to mere war production as such. Under this interpretation the Board has far-reaching powers and may assert jurisdiction over many industries even though they are not directly related to war operations. The solemn warning which is the big stick of the Board is the Presidential power to commandeer industry. Defiance of the Board may mean management's ouster.

In the aluminum case the War Labor Board reduced by 1/3 the North-South differential in hiring—in wages as between plants of a large corporation—by an increase of starting wages at Southern plants.

Reduction of the differential, ruled the Board, moves toward a socially desirable end and will serve as a work incentive. It con-

cluded, however, that to get a reduction at this time would introduce a disruptive influence at an unfortunate time. The company acceded to the majority decision under protest. A moderate premium was established for workers on night shifts.

PRECEDENTS SET

Ability to pay is to be taken into account as a factor in setting wages when the employer is able to pay *more* than the minimum standard of health and decency.

Better paid workers are not to expect the wage level to pace day by day with the increase in the cost of living.

The War Labor Board laid down the principle that it will respect the determinations made by other tribunals.

Called upon to settle a dispute over the validity of a closed-shop contract between the Los Angeles Railway Corporation and an AFL union, the Board held itself bound to follow the decision of a California state court which had found the contract legal under the State Labor Code.

The case came before the Board after attempts by a CIO union to have the closed-shop contract invalidated had culminated in a strike threat. The strike was averted through an interim agreement, effected by labor members of the Board, which provided that all employees should be required to join some union pending final determination of the dispute by the Board. The Board found that the legality of the company's contract with the AFL union had been sustained by the California Superior Court in a suit instituted by CIO members. To do anything other than follow this court's decision, the Board declared, would result only in the encouragement of jurisdictional union strife. Both CIO members of the Board dissented.

Where a wage structure is set by the terms of a contract agreed upon by the company and the union, and which binds the parties for a given term (until Oct. 1, 1942), no changes can be made under this contract except by mutual consent. *The Board ruled that it will not be used by either management or labor to escape from the terms of any voluntary collective bargaining agreement while that agreement is still in effect.* To adopt any other course would do irreparable harm to the whole structure of industrial relations in this country and endanger successful prosecution of the war.

To date there have been few cases of defiance of the Board's authority. In one, compliance was rendered after the Board's decision. In the second case, the President ordered compliance. The third case of defiance involving a union was before the Board while its dispute was before the Board for determination. Apparently, the Board did not act fast enough to suit this union, but it certainly acted very rapidly upon the union's defiance. Within four hours after this unauthorized stoppage of work, the employees were back on the job, following very definite representations which were made to them by an employee member of the War Labor Board.

In one case the War Labor Board settled the dispute between the Central States Employers Negotiating Committee and the International Brotherhood of Teamsters (AFL) by recommending that the parties adopt a clause in their proposed contract which the employer feared was in violation of the anti-trust laws. Said the Board:

"It is the opinion of the Board that there should be no hesitancy on the part of either the operators or the union to adopt the language of draft Exhibit A on the grounds of any legal technicality, such as any feared violation of the anti-trust laws. The record will show that the parties adopted the language in compliance with the orders of the National War Labor Board, which in turn is charged with the responsibility of finally determining labor disputes which interfere with the prosecution of the war."

In another case when certain employees, leaders in a union, participated in a slow-down and strike, the Board recommended to the employer that he discharge them.

To management's contention that membership maintenance and the closed shop are not properly subjects of involuntary arbitration the War Labor Board has countered that we are at war: while compromises must be made, the *course* of the compromise it alone will dictate.

INTER-AMERICAN ARBITRATION

COMMERCIAL ARBITRATION CONSIDERED AT THE HAVANA CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION

WILLIAM ROY VALLANCE *

DURING the past two years great strides have been made in bringing about better understanding and cooperation among the lawyers of the Americas through the newly organized Inter-American Bar Association. The enthusiasm with which this new organization was received was given expression at the First Conference of the Association held at Havana during the week beginning March 24, 1941, ten months after its constitution was signed at Washington, May 16, 1940. Over 600 delegates, observers and guests representing 46 member bar associations and 16 countries responded when the roll was called at the opening session in the Hall of the House of Representatives in the beautiful capitol building. Representatives were present from Canada on the north and from Argentine and Chile on the south, when Dr. Jose Manuel Cortina, Secretary of State for Cuba, and Dr. Natalio Chediak, of the Havana Bar Association, heartily welcomed the visiting delegates and outlined some of the purposes of the Conference.

It was altogether appropriate that the program of the Conference should include as a subject for discussion the topic "Commercial Arbitration" in view of its importance as a method for the settlement of disputes and the furtherance of commerce. It was my pleasure in responding to the address of welcome on behalf of the visiting delegates to stress the importance of pacific settlement of disputes in the following words:

> "Permit me to emphasize that the solution of our legal problems can be accomplished through joint cooperative action rather than through force or domination. Treaties in force between the countries of the Americas constitute international legislation regulating their relations with one another. There are approximately 75 such treaties dealing with virtually every phase of inter-American relations such as peaceful settlement of disputes, provisions for solving economic and commercial

* Secretary General, Inter-American Bar Association.

problems and for promoting cultural, educational and scientific co-operation, the regulation of means of communication, including aviation, radio, shipping and highway transportation, sanitary measures for the prevention of the spread of disease, and many other provisions. This cooperation between our nations is not a temporary sporadic effort but it represents a constant and continuous interest of the governments which is reflected in the creation of a permanent organization, namely, the Pan American Union, and in the periodic character of their meetings."

The tremendous significance of the peaceful settlement of commercial as well as international disputes was particularly stressed at the Havana meeting by one of the outstanding contemporary teachers and writers in the legal field, Dr. Philip C. Jessup. In a paper presented at the Conference regarding inter-American cooperation, Dr. Jessup made the following statements:

"That inter-American cooperation if it is to endure, must rest not solely on the mutual interests of governments but even more on a fundamental understanding of mental processes. In international as in domestic affairs, a great part of the friction in the world arises from misunderstanding. In the law this is especially true. I recall one international arbitration in which the difference between the systems of judicial procedure in the Anglo-American and in Civil Law countries led to suspicion and recrimination. The procedural differences and their implications are well brought out by Dr. Durward E. Sandifer in his recent book, *Evidence before International Tribunals.* These aspects of comparative law should be studied in order that future international arbitrations may surely eliminate rather than produce friction. In mixed claims commissions we always have one arbitrator from each party but the third arbitrator or umpire must necessarily be trained either in the civil law or in the common law tradition. No one can doubt that a lawyer familiar with both habits of legal thought is the better able to discharge the duties of an arbitrator in a dispute between two countries which represent these two great legal systems."

One of the outstanding personalities at the Conference was Dr. Antonio Sanchez de Bustamante y Sirven, whose services in the cause of arbitration and his contributions to the law on this subject as a judge of the World Court and as author of the Code of Private International Law are too well known to require mention. I need only refer to his message on *Inter-American Commercial Arbitration and Good Will* published in the January, 1937, issue of the ARBITRATION JOURNAL, in which he makes the following statement:

"A difficulty that has arisen in practice and which, perhaps, has retarded the introduction, spread and success of the campaign in favor of inter-American commercial arbitration has been the impossibility of

> enforcing compliance with arbitral awards outside of the country in which they were given. But that obstacle has been in great part overcome. In fact, Article 432 of the Code of International Private Law, approved in the Sixth Pan American Conference of 1928, and therein officially named 'The Bustamante Code,' in its Article 432, forming part of the chapter devoted to the *Execution of Foreign Judgments* provides that 'the procedure and the effects regulated in the preceding articles shall be applied in the contracting states to awards made in any of them by arbitrators or friendly compositors, whenever the case to which they refer can be the subject of compromise in accordance with the legislation of the country where the execution is requested.' This last condition is fulfilled in all the states of America, because it deals with private interests of a commercial nature; and the Code cited already is in force, as expressly adopted legislation, in 15 American republics that contain a population of more than 70 million inhabitants."

It is significant that the fourth resolution adopted by the Conference dealt with the subject of enforcement of judgments and reads as follows:

> "First: That this Association favors the execution by all the states of the Americas of treaties or their adherence to a convention providing a simple, expeditious, effective and inexpensive system whereby the tribunals of each country, by invoking the assistance of the tribunals of others, can procure the service of documents and obtain evidence within the territory of others, procure information upon the law of other states, and assure the recognition and execution of their final judgments, according to the recognized principles of international law, and
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> "Second: That the members of this Association recommend to the proper authorities of their governments that appropriate steps be taken to effectuate the purposes of this Resolution."

It was further recommended in Resolution 18 "that the signatory countries that have not ratified the Bustamante Code of Private International Law, signed in Havana in 1928, be urged to do so at the earliest possible moment, by the respective bar associations."

In his stirring address to the Conference, Dr. Bustamante expressed the view that today "individual action is being substituted with increasing success by collective effort represented among the divers nations through these Congresses and Conferences, of undisputable utility in human progress and welfare." He stated that comparative law "should not be considered as a movement but as a laboratory or a factory" and that "human life is a train in movement and not a pyramid destined to watch impassive and unchangeable the passage of the cortege of the centuries." Dr. Bustamante expressed the view that assistance

in bringing about the material unity of the positive law of this hemisphere, which he declared to be "more necessary today than ever in the face of the military crisis of Europe and Asia," constitutes an end toward which the Inter-American Bar Association contributed in a practical and also in a patriotic manner.

The difficult problem of choosing between the principles of the common law and of the civil law, which arises in Canada as a result of the continuance of the French civil law in the province of Quebec, was brought out in an address entitled "English and French Law in Canada" by the Honorable D. L. McCarthy, of Toronto, who was President of the Canadian Bar Association, in which he advised the members of the Conference regarding the means by which these two differing systems of law function under the same flag.

In an address on "American Solidarity," Dr. Enrique Gil, from the other end of the hemisphere, spoke for the lawyers of Argentina and expressed the view that unity of understanding could be attained in a hemispheric sense, just as Canada had accomplished it among her provinces. His views were expressed in part as follows:

> "I have never understood that stubborn and continuous determination to exploit differences and antagonisms, to keep alive reciprocal ignorance and misunderstanding, when that procedure only leads to sterility of effort. On the other hand, I conceive and understand how wise and sane it is to encourage the emulation which stimulates and is fruitful, which is generous and not selfish, prodigal and not calculating, creative and not destructive of values; emulation, a sentiment proper of peoples well endowed by nature, and who experience that sentiment in the face of grandeur, prosperity, superiority, or in the presence of the beautiful, as a demonstration of confidence in themselves and a negation of any inferiority complex.
>
> "More than once I have pointed out that those differences which are often exploited as antagonisms, and which are reflected even in the different way that the Anglo-Saxon and the Latin people develop the law, constitute the corner stone upon which American civilization of the future is to rest. To illustrate this opinion, I believe it is opportune, in this Conference in which distinguished men of Law have been assembled, to recall a fact that I am sure has not passed unnoticed by them: Law in the United States, the law in its literal and absolute conception, we find is essentially represented by the decisions of the courts, which is called the 'Case System.' The Law in the legislation of the Latin-American peoples is represented by an organized body of legal precepts: the Codes.
>
> "We have therefore symbolized in that mental process, which is highly significant, the different way the peoples of both races have of reason-

ing; some go from the particular to the general, from the concrete case to the abstract doctrine; the others from the doctrine to its application to a concrete case. This is an analysis and synthesis at the same time, which could be illustrated with innumerable other examples that confirm the truth of the statement."

The use of commercial treaties between the American nations for the settlement of international disputes was described in an interesting address by Dr. Lawrence Deems Egbert on the subject "Latin American Commercial Treaties." The following extract from Dr. Egbert's paper is of particular interest:

"From the beginning of the national life of the Latin American nations, in the early decades of the nineteenth century, until the present time, more than 1,000 commercial treaties and agreements have been negotiated. Approximately 80 per cent of these agreements are with nations other than those of Latin America.

"The principal subjects dealt with in these treaties are, in order of frequency, most-favored-nation treatment, tariff concessions, import quotas, and clearing and exchange; these constitute 84 per cent of the provisions of commercial agreements negotiated. The remaining 16 per cent deal with such matters as mixed commercial commissions, certificates of origin, 'freedom of trade' clauses, interpretation of treaty provisions, declarations against trade prohibitions and restrictions, procedural matters (such as the modification of the date required for exchange of ratifications), provisions for treaty application to colonies or other political sub-divisions, and a score of miscellaneous matters."

The importance of the Conference in providing a common ground on which the lawyers of America can meet, discuss their problems and work out recommendations to their Governments cannot be too strongly emphasized. There has always been the realization that significant progress in the solution of difficulties between individuals in the Americas contributes to the benefit of all the Pan American nations. Particular significance attaches to the following words of the Honorable Spruille Braden, Ambassador of the United States to the Republic of Cuba and Honorary Chairman of the Inter-American Commercial Arbitration Commission, printed in the January, 1941, issue of the JOURNAL:

"Political disputes are in general more spectacular and of more immediate peril to peace than those which arise in commerce. However, the latter, even though they may be of inconsequential appearance, if they are not stopped in time, may, like a spark unnoticed, grow and spread into a devastating conflagration. The Inter-American Commercial Arbitration Commission was established to eliminate, in a practical and just manner, these incipient threats to our tranquillity."

One of the most important resolutions adopted by the Conference related to the safety of foreign investments. This resolution, introduced by Dr. Eduardo Salazar of Ecuador, reads as follows:

> "To recommend that the academies, institutes or associations of lawyers, and particularly those which are members of the Inter-American Bar Association, exert influence in their respective countries in behalf of legislative uniformity in matters relative to foreign investments, endeavoring to have included in such legislation principles which, while assuring the integrity and economic and commercial progress of each country, shall afford the foreign investor sufficient protection to encourage such investments."

In support of the resolution Dr. Salazar made the following comment:

> "We believe that investors will feel better guaranteed with this type of courts than with the exalted and deficient diplomatic protection. Naturally their jurisdiction, of an arbitral character, would come from voluntary submission by the parties, not only without going against, but affirming the general principles and fundamentals which are set forth in this thesis.
>
> "These could be still broader in scope and more general for any case which may arise between nations of various countries or between nationals of one country and authorities of another and could be established by means of multilateral or local treaties for any case which arises between nationals of two countries or between nationals of one of these two and authorities of the other and created by bilateral or special treaties for each case and provided for in the contract, concessions, franchise or whatever document is executed between the investor and the authorities of the country in which the investment is made.
>
> "The development of trade and industry every day presents new technical problems concerning which it is not possible for the legislation of every country to be up to date. There are common expressions in business dealings to which not everyone gives the same interpretation, such as the expressions intangible property and its estimation, just price, reasonable profit and other expressions which would be better defined and the interpretation of which would be better received, by both interested parties, if it were given by a court which, in addition to having components of different nationalities and therefore being able to elucidate various outlooks and ways of viewing things—which, despite being opposed, are often considered intrinsically just by both contending parties—would be composed of people who had specialized in commercial and industrial matters, people of guaranteed rectitude and independence, equipped to grasp and weigh the arguments and the justice of the contenders.
>
> "The ordinary courts of the various countries, despite their recognized probity, are usually formed only of experts in domestic legislation and they can scarcely inspire the foreign investor with confidence

in their commercial or industrial judgment. Furthermore, promptness in the solution of difficulties is a requisite of inestimable value for investors who cannot remain indefinitely awaiting sessions of the ordinary courts which are usually loaded with work and unable to give preference to the despatch of specific cases.

"Even in case of the creation of special international courts, obligatory terms will have to be set for the settlement of disputes submitted to them.

"By previous agreement between the parties, these courts could also be used for purposes of consultation. In many cases, an inquiry settled in time prevents a dispute. In this way the aforesaid courts could be preventive and conciliatory in character, something which would result in inestimable benefits and facilities not only to the investors but to the country in which the investment is made, preventing friction and difficulties which often occur in the very peculiar circumstances of each business and are so unforeseen that it is very difficult to anticipate them by legislation."

The International Law Association at its Fortieth Conference, held at Amsterdam in 1938, considered a proposal for meeting the difficulties caused by the Calvo clause. It was suggested that an arbitration clause should be inserted in concession contracts. The following extract from the Report of its Proceedings on the subject, "Business Contracts with Foreign Governments" is of particular interest:

"The International Law Association has realized that . . . . in order to meet the pressing needs of trade and other international relationships, it might be useful if private initiative would take the matter in hand without further delay and draft an arbitration clause to be inserted into contracts between private individuals and foreign States.

"Amongst those contracts one may consider as the most important: contracts for the sale of goods, agreements between a State and a contractor and loan contracts entered into by a State.

"In proposing this method [1] we have been guided by excellent examples such as the York-Antwerp Rules and the Hague Rules.

"The authors of those rules understood that, pending the conclusion of international treaties, it is possible, in this matter of the Law of Contracts, to derogate from and to amplify the law which in every special case would be applicable, by means of clauses inserted into the usual forms of contract. Thus almost all charter-parties and bills-of-lading have for many years referred, almost without exception, to the York-Antwerp Rules, which contain important provisions concerning General Average. In the same way the Hague Rules are inserted into

[1] It may be asked why the parties to the contract do not submit their disputes to that admirable institution the "Cour d'Arbitrage" of the International Chamber of Commerce. The reason is that the Arbitration Rules of the Chamber contain various provisions which are difficult for sovereign States to comply with.

the same documents in order to regulate the Contract of Carriage. As to the latter Rules it is to be noted that private initiative led to legislative results and that the Brussels Convenion of 1923 gave legal effect to the Hague Rules as the uniform law of the contracting States."

The Conference selected Buenos Aires as the place for its second meeting and Dr. J. Honorio Silgueira, President of the Federacion Argentina de Colegios de Abogados, was chosen as its President. Arrangements are now being made to hold the Conference there September 20-27, 1942.

It is expected that the Buenos Aires meeting [2] will bring about further understanding, cooperation and solidarity among the lawyers of this hemisphere in defense of democratic principles and settlement of all disputes whether of a political or a commercial nature through arbitration. This ideal of the Association was well set forth in the words of our Honorary President, Dr. Manual Fernandez Supervielle, of Havana, in the following words taken from one of his addresses:

"The war we are witnessing is a struggle between the unbridled fury of the material forces of men, applied to evil by the selfish and criminal instinct of a group of men, and the supreme effort made by peoples who aspire to carry the spiritual and moral progress of human beings to a higher degree than has been reached so far. The struggle must end in the triumph of spirit over matter, and then a new era and a new life is to begin for humanity. . . . . Let us hope that, ... with the help of God, the lawyers of this continent will be able to apply their greatest efforts to the task of leading these young and vigorous American countries to the forefront in world affairs and over the road of a more peaceful, more secure, more worthy, and more Christian life—over the road of a true civilization."

PROGRAM OF THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION FOR 1942

THE Commission was established in 1934 by Resolution of the Seventh International Conference of American States and pursuant to a resolution by the Governing Board of the Pan American Union. It is a semi-official organization for the purpose of establishing closer relations among the commercial organizations

[2] A circular containing detailed information regarding the Second Conference and the subjects scheduled for discussion may be obtained by writing the Headquarters Office of the Inter-American Bar Association, 337 Southern Building, Washington, D. C.

of the Americas. While it is entirely independent of official control, its policies and practice are carried out in cooperation with the Pan American Union and its work is the joint endeavor of all of the twenty-one Republics. Their representatives on the Commission direct its work. In the Resolution of the Seventh International Conference, certain arbitration standards were established for each Republic which they undertake to carry out to give uniformity and effective operation to an inter-American system of Arbitration.

PROGRAM FOR 1942

At a meeting of the Commission, held on April 14, 1942, the following program for the development of arbitration in inter-American trade relations was approved, with the suggestion that it be sent to all members of the Commission who could not be present, for their suggestions.

The program is divided into four sections: 1) The program of the Commission in relation to all National Committees. 2) The program for each National Committee. 3) The general work of the Commission as a central administrative body. 4) Procedure for receiving and disposing of commercial controversies and misunderstandings.

In 1942 the Commission will endeavor to carry out, as closely as possible, the following program or as it may be amended by the Commission from time to time.

I. PROGRAM IN RELATION TO EACH NATIONAL COMMITTEE

1. The Commission will receive nominations for a Chairman for each National Committee and will make the appointment. Each Chairman will be invited to become a member of the Commission during his term of office.

2. The Commission will then suggest to the Chairman of each National Committee that he nominate members of his Committee and make a selection of a secretary and treasurer. It might also be advisable to have one or more vice Chairmen. The Commission would appreciate being advised in advance of these selections so it may convey any comments to the Chairman.

3. As soon as the other members and officers are chosen, the Commission suggests that a meeting be held and a headquarters established to receive communications and visitors and that the

Commission be informed concerning the meeting and the location of the headquarters.

4. Insofar as possible, the Commission would like to make a small grant of funds toward the expenses of such a headquarters, but hopes the National Committees will set up a budget and undertake to help finance the work of the Committee. It is not expected that a National Committee will contribute at this time to the general expenses of the Commission.

5. As the Commission makes reports and sets forth its activities in the ARBITRATION JOURNAL, it will greatly appreciate receiving a quarterly report and any other information that will reflect favorably the work of each National Committee.

6. As the Commission has three important sub-committees, it invites the Chairman of the National Committee to propose a member for each Committee. These Committees are: Banks, for which a banker should be nominated; Publicity, for which an editor or other leading educator, writer or public leader should be nominated; Law Committee, to which a jurist or member of the bar should be nominated.

7. Should the National Committee require the cooperation of the Commission in arranging for publicity in the press or in trade publications or for broadcasts or other ways of bringing the work of the National Committee or Commission before the public, the Commission will be glad to receive from the Chairman or Secretary of the National Committee suggestions as to how the Commission can cooperate.

8. The headquarters of the Commission are located in Rockefeller Center, in New York City. It has reception and hearing rooms and administrative offices. If the Chairman or Secretary will advise the Commission of the impending visits of any members of the National Committee or other persons to the United States, the Commission will esteem it an honor and pleasure to extend the courtesies of its headquarters and to acquaint them with the activities of the Commission.

II. PROGRAM FOR NATIONAL COMMITTEES

Among the many things which each National Committee, it is believed, will wish to undertake upon its own initiative, the Commission suggests the following:

1. That announcement be made in the press as soon as the headquarters are ready and the secretary is appointed.

2. That this headquarters furnish for local distribution information concerning the work of the National Committee and that of the Commission. For this purpose the Commission will try to furnish the National Committee with publications and information.

3. That the National Committee promote the use of arbitration clauses in contracts and communicate with business concerns, furnishing them with such clauses. Also that the interest of Chambers of Commerce be enlisted in their distribution. The Commission will send a supply of the clause in Spanish if this work is undertaken.

4. That the National Committee make nominations for the Panel of Arbitrators as soon as convenient. These should include nationals, resident citizens of the other American Republics and permanent resident members of the United Nations in the event that nationals of either party are not to be called upon. The qualifications for this office will be provided to each National Committee.

5. It is the hope of the Commission that the National Committee will set up, as soon as possible, a sub-committee on arbitration law to carry out the standards set by the VIIth Conference. The improvement of arbitration laws and the education of the bar in the use of arbitration are two of the most important things before National Committees.

6. The Commission anticipates also that the National Committee will wish to appoint an educational committee, for there is so much to be done in the way of lectures, addresses, articles, discussions and instruction upon the subject and in the distribution of literature.

III. GENERAL WORK OF THE COMMISSION

There is much that the Commission can undertake in the promotion of a uniform system of commercial arbitration throughout the Americas. It can do so only with the direct and active cooperation of the National Committees and by giving them all the help it can. It is prepared to undertake the following things for all National Committees and to carry out as far as possible any other suggestions it receives.

1. It plans to publish a pamphlet on the organization and work of the Commission, containing the rules of procedure. It will be printed in English and Spanish and will be made available to

each National Committee in such number as it can use and so requests.

2. The ARBITRATION JOURNAL (published in English only) will contain news and information and will print articles on inter-American arbitration. This will be sent to each National Committee with the compliments of the editors.

3. The Commission plans to issue a *Digest* of the activities of the National Committees and to exchange them so each Committee may be fully informed of the work being done in each Republic.

4. This Commission will act as the clearing house between all National Committees and for all complaints or differences requiring adjustment or adjudication.

5. The Commission will be in active communication with each National Committee for the purpose of making or receiving suggestions and for furnishing any information or facilities as they may be needed.

6. The Commission will announce to other National Committees and to the public the opening of headquarters in each Republic and will direct interested persons to these headquarters.

IV. PROCEDURE FOR RECEIVING AND DISPOSING OF CASES

Parties to disputes may both be residents of the same Republic (although nationals of different Republics) or they may be residents of different Republics.

1. When both parties reside in the same Republic, the National Committee located in that Republic receives the complaint and endeavors to adjust it. Should such complaint be sent to the headquarters of the Commission, the headquarters will refer it to the appropriate National Committee.

The National Committee usually takes the following steps: (a) Having received the statement of the complaining party, it requests a statement from the party complained against, so as to have all facts before it. (b) The Committee then endeavors to bring the parties together in conference or acts as intermediary with a view to bringing about an understanding. (c) If such understanding cannot be brought about, it endeavors to obtain the consent of both parties to submit the matter to arbitration under the Rules of the Commission. If the parties already have an agreement to arbitrate when a complaint is referred to the

Committee, it proceeds immediately with arrangements for an arbitration without the intermediary steps.

2. When the parties reside in different Republics, the headquarters of the Commission receive the complaint. If the complaint is filed with a National Committee, such Committee forwards the statement, together with such comments or recommendations as it may have, to the headquarters of the Commission. A communication is then sent from the headquarters to the National Committee in the Republic wherein the other party resides. The headquarters of the Commission then act as intermediary and clearing house between the two National Committees in an endeavor to bring about an adjustment or in arranging for arbitration.

3. There will at all times be an interchange of information between the headquarters of the Commission and the National Committees. The headquarters of the Commission will furnish each National Committee with reports on cases concerning nationals or residents of the country in which that Committee functions, and the National Committees will furnish the headquarters of the Commission with reports on all cases they handle so that a full record of all cases will be available at such headquarters.

INTER-AMERICAN NOTES

Inter-American Commission Elects Officers. Ambassador Spruille Braden, temporarily in the United States en route to take up his duties as the new United States Ambassador to Cuba, was guest of honor at the annual meeting of the Inter-American Commercial Arbitration Commission on April 15. Thomas J. Watson, Chairman of the Commission, was host at a luncheon which preceded the meeting, held at the headquarters of the International Business Machines Corporation.

The following officers of the Commission were elected: Honorary Chairman, Hon. Spruille Braden; Chairman, Thomas J. Watson; Vice Chairmen: Herman G. Brock, Vice President of Guaranty Trust Company, Daniel A. Del Rio, Assistant Vice President of the Central Hanover Bank and Trust Company; Miguel L. Pumarejo, former Colombian Minister to the United States, and Robert Casas Alatriste, of Mexico City; Executive Member, Frances Kellor, First Vice President of the American

Arbitration Association; Executive Secretary, Joseph M. Marrone. James S. Carson, Vice President of the American and Foreign Power Company, was elected Chairman of the American Committee of the Commission.

In accepting the Chairmanship of the Commission, Mr. Watson pointed out that its experience, and action now being taken by the Commission as a part of a Western Hemisphere system of defense, will make the Commission an indispensable instrument in reconstruction after the war, when problems and readjustments of all nations would be the greatest economic problem in all history. He said:

> "When the sword is laid aside, arbitration must take its place. Today, one of the instruments being preserved by the International Chamber of Commerce at its headquarters in Stockholm is its arbitration organization, and one of the first steps to follow in reconstruction will be the expansion of the work which this Commission is carrying on so effectively in the Americas."

On April 25, Ambassador Braden addressed a luncheon meeting given in his honor by the officers and directors of the Commerce and Industry Association of New York.

Inter-American Arbitration System Swings into Action. With the increasing number of questions which are being referred to the Inter-American Commercial Arbitration Commission for adjustment or arbitration, it has seemed timely to strengthen and complete its machinery in the Latin American Republics. During the first few years of the operation of the Commission, the great majority of the complaints originated in Latin American countries and were directed against United States importers or exporters. The situation has, however, changed materially. Complaints now before the Commission may as easily involve two Latin American business men resident in any two different Republics, and occasionally they even involve residents of Canada.

Strong panels of arbitrators and active National Committees have, therefore, become necessary in all countries, to deal with disputes promptly and in the locations where they can most conveniently be examined and adjusted.*

In order to expedite such organization of arbitration facili-

* A recent example occurred when, in a dispute between an Argentine and a firm in the United States, the parties expressed a preference for referring the matter to representatives of the Commission in Mexico.

ties, the Executive Secretary of the Commission recently spent four weeks in Mexico,* and at the time this note is written is spending two months in Peru, Colombia, Ecuador and Cuba.

Not only is the machinery of the Commission being completed in this manner, so that its mechanical efficiency is greatly increased, but also the friendly, personal contacts established are adding their influence toward the better understanding and closer harmony which the Republics of the Western Hemisphere seek to foster.

Compulsory Arbitration of Cuban Labor Disputes. Compulsory arbitration for the settlement of labor disputes in Cuba, in the event conciliation procedure has failed, is established by Decree 559, effective March 5, 1942, and supersedes the earlier Decree 3315, of December 1941.

The new regulations provide that when conciliation between conflicting parties has failed, the dispute must immediately be submitted to arbitration, with the Conciliation Commission continuing as an Arbitration Commission. Decisions must be made within 24 hours and transmitted to the interested parties, either of whom, if dissenting, may appeal to a National Arbitration Commission within a period of five to eight days, depending upon the place of residence of the dissenting party.

The permanent National Arbitration Commission is established in the Labor Department, and is composed of the Minister or Assistant Secretary of Labor, as Chairman, the Chief of the Advisory Division and a legal advisor of the Labor Department, two representatives of employers and two of labor, designated by the Minister of Labor from lists of names submitted by the respective groups.

The decision, or "resolution," of the Commission shall be obligatory and may not be appealed. Violation of or failure to comply immediately with decisions will incur administrative fines of from $20 to $500, imposed by the Minister of Labor after verification of the infraction. However, administrative appeal from the imposition of the fine may be made, provided the amount of the fine is paid on deposit. If the party affected fails to comply with the Commission's resolution within three days after it is repeated, the Minister of Labor will designate

* See *Arbitration on American-Mexican Trade Routes*, in the Winter, 1942, issue of the JOURNAL.

a supervisor of the enterprise or business in order that necessary measures may be adopted to assure immediate compliance with the resolution.

Members of the National Arbitration Commission, with the exception of the Chairman, will receive a fee from $5 to $10 for every session attended, but the total for each member shall not exceed $150 monthly.

Mexican Oil Settlement. The joint United States-Mexican committee named by President Roosevelt and President Camacho to determine compensation to be paid the nationals of the United States as a result of expropriation of American-owned oil properties by Mexico on March 18, 1938, fixed $23,995,991 as the sum to be paid by Mexico to the American companies. The award was announced on April 18, by Morris Lewellyn Cooke, of Philadelphia, chairman of the Shipbuilding Stabilization Committee, United States member, and Manuel J. Cevada, representing the Mexican Government.

Student Participation in Inter-American Affairs Contest. Nelson A. Rockefeller, Coordinator of Inter-American Affairs, announced January 24 that the Coordinator's Office has invited approximately 700 colleges and universities in the United States to participate in a nation-wide discussion on inter-American affairs.

"We of the New World are now allies in a struggle against a force that does not recognize the principles of mutual understanding and voluntary cooperation," said Mr. Rockefeller in making the announcement. "These very principles can constitute one of our great weapons in this struggle, and I hope this discussion contest is one way of sharpening that weapon."

Pan American Day in Southern California. Plans to establish a program for the increasing of two-way trade, travel and cultural relations between Southern California and countries of the Western Hemisphere were laid by Southern California business, civic and government authorities when the second annual Inter-American Conference met at the University of Southern California on April 14. The Conference was arranged by the Los Angeles Chamber of Commerce, Southern California Inter-American Council and the University. Wayne C. Taylor,

Under Secretary of Commerce and speaker at both the luncheon and dinner meetings, discussed the significance of the Conference of American Republics at Rio de Janeiro.

Work of Commission "Invaluable." One of the largest international corporations in the United States recently requested some literature concerning the activities of the Inter-American Commercial Arbitration Commission, and was sent its report, general arbitration clause and a summary of cases disposed of during the past year. The President of the Company, under date of April 14, 1942, addressed the following letter to a member of the Commission:

> "We have already come to the conclusion that we should endeavor to include, whenever it seems desirable and possible, the standard arbitration clause in our contracts. I am passing your letter together with the enclosures around the office for noting. The work of the Commission should be invaluable to inter-American commercial relations, and I think the case summaries attached to your letter are only to a limited extent indicative of the possibilities."

PRE-WAR JUSTICE IN ETHIOPIA

> "There was no special tribunal or hall in Ethiopia for the settlement of legal disputes. An elderly citizen coming along could be instantly pressed into service as judge or arbiter in a quarrel. The elderly one accepted with alacrity, first because it was a mark of honor to be singled out by his fellows for the judicial position and second, because a fee attached to the job.
>
> "A few boxes were piled up and the law was hoisted on his throne, and a boy was placed behind him to chase off the flies with an umbrella of straw. Then the litigants advanced with bows and obeisances and the arguments began amidst the deathly silence of the otherwise tumultous Ethiopian street crowd." (From "Days of Our Years," by Pierre van Passen.)

FOURTH QUARTERLY REPORT OF THE MOTION PICTURE ARBITRATION TRIBUNALS

SYLVAN GOTSHAL *

THE first year of operation of the Motion Picture Arbitration Tribunals established under the Consent Decree ended January 31, 1942. 168 Demands for Arbitration were filed during the year in thirty of the thirty-one tribunals. 120 of the cases filed were disposed of: 78 by awards and 42 by settlement or withdrawal. 37 of the awards rendered were in favor of the exhibitor and in 41 cases the exhibitor's claim was disallowed.

The general object of the Arbitration System established under the Decree was to afford an opportunity for the exhibitor to present to an impartial arbitrator complaints regarding any unfair competitive situation imposed upon him through his contracts with distributors for the purchase of pictures. It is impossible to state the results obtained in the cases settled and withdrawn, as there is no requirement to file such information upon the withdrawal of a complaint. It would seem, however, that an exhibitor withdrawing his complaint must have made some satisfactory adjustment of the situation complained of and it would, therefore, appear that in those cases the exhibitor had improved his business situation. In the 37 arbitrations where the exhibitor secured an Award, he either obtained a reduction in the clearance imposed upon him in his contracts or he secured pictures which he sought under the terms of Section VI of the Decree.

Seventy per cent of all cases were brought under Section VIII of the Decree, the clearance section. In view of this large preponderance of clearance cases it will be of interest to survey briefly the changes made through the Awards.

In the Boston Tribunal, two awards reduced the previous clearance imposed against the exhibitor from sixty to thirty days.

* Acting Chairman, Administrative Committee of the Motion Picture Arbitration System of the American Arbitration Assn., in the absence of Chairman Paul Felix Warburg, now absent on official duties in Washington. This Report was prepared from material compiled for the Committee by J. Noble Braden, Executive Director of the Motion Picture Arbitration Tribunals.

In the New York Tribunal, in five awards the clearances were reduced from thirty to seven days; from thirty to twenty-one days; from twenty-one to seven days; from thirty to twenty days, and from fourteen to seven days. In two other cases in the same Tribunal, clearance was reduced from fourteen to seven days. Similar reductions will be found in awards in the other tribunals. In Denver, a reduction of clearance was awarded from twenty-one to three days. In New Haven, in two cases clearance was reduced from fourteen to seven days, and from thirty to twenty-one days. In Washington, in two cases clearance was reduced from seventy-four to thirty days, and from seventy-four to forty days. In the Dallas Tribunal, clearance was reduced in two cases, in one from sixty to fourteen days, and in another from forty-five to fourteen days.

These figures seem to indicate clearly that substantial benefits have been obtained by successful exhibitors who have sought arbitration under the Decree.

In January, the Department of Justice, through Mr. Robert L. Wright, Assistant Attorney General in charge of the Motion Picture Unit, issued a general report on the first year of the Decree. The report commended the operation of the Arbitration System. Mr. Wright stated that "the American Arbitration Association has set up and administered the System in a manner which the Department regards as eminently satisfactory."

No report of the operation of the Motion Picture Arbitration Tribunals would be complete without an expression of appreciation to the Motion Picture Press for the splendid support it has given the System and for the generous allocation of space, in both the daily and weekly publications, to the activities of the tribunals. In addition to reporting the filing of new cases and the awards as they have been rendered, the Press has been generous in publicizing the names of arbitrators and in announcing changes in the personnel of the System. In addition, the two yearbooks in general use in the industry have given pages of statistical reports of the operation of the tribunals and a complete directory of arbitrators and personnel.

In a further effort to be of service to the Motion Picture Industry, commencing with the first of the new year awards of all arbitrators have been mimeographed and copies placed on file in each of the thirty-one tribunals where they may be consulted by any persons interested. Copies of Appeal Decisions

have been made available throughout the year in a similar manner and many requests for copies of such Decisions have been received. Therefore, at the beginning of the new year additional copies of all Appeal Decisions were printed and are now available for distribution to any parties interested at the nominal cost of twenty-five cents per copy, which covers the cost of printing and mailing.

The Spring and Fall numbers of the ARBITRATION JOURNAL contained complete reports of the first, second and third quarters, covering the period from February 1 to October 31, 1941. In the fourth quarter, ended January 31, 1942, 29 additional cases were filed making a total of 168 cases received in the tribunals in the first year of their operation. These cases were distributed among thirty tribunals as follows:

Albany	3	Des Moines	3	New York	31
Atlanta	2	Detroit	8	Oklahoma City	1
Boston	8	Indianapolis	2	Omaha	1
Buffalo	11	Kansas City	4	Philadelphia	17
Charlotte	2	Los Angeles	4	Pittsburgh	3
Chicago	12	Memphis	3	Portland	2
Cincinnati	4	Milwaukee	2	St. Louis	5
Cleveland	2	Minneapolis	4	Salt Lake City	1
Dallas	5	New Haven	6	San Francisco	4
Denver	3	New Orleans	5	Washington, D. C.	10

(No cases were presented in Seattle)

By classification the 168 cases filed were divided as follows:

Clearance (Section VIII)	118
Some Run (Section VI)	28
Designated Run (Section X)	4
Combination (two or more sections of the Decree)	18
	168

During the course of the first year 22 cases have been appealed; 17 have been concluded by decisions by the Appeal Board. Of the 17 decisions which have been rendered by the Appeal Board, 7 have modified the award of the Arbitrator, 5 have reversed the Arbitrator's award, and 5 have affirmed the Arbitrator's findings; 9 decisions have been in favor of the distributors, and 8 in favor of the exhibitors.

The arbitrators who served in the hearings held in the Fourth Quarter of the operation of the tribunals were:

Arthur L. Brown, Boston, Professor, Boston University Law School; Edward W. Hamilton, Buffalo, Attorney; Michael Catalano, Buffalo,

Attorney; Thomas McConnell, Chicago, Attorney; Drennan J. Slater, Chicago, Attorney; J. C. Dempsey, Cincinnati, Attorney; J. B. Adoue, Jr., Dallas, President, National Bank of Commerce; S. J. Hay, Dallas, President, Great National Life Insurance Company; Paul W. Voorhies, Detroit, Attorney; Ferris Stone (2 cases) Detroit, Attorney (former President, Detroit Bar Association); H. Eugene Breitenbach, Los Angeles, Attorney; George S. Harris, New York, Dean, University of Newark Law School; Lloyd Buchman, New York, Attorney; Calvin H. Rankin, Philadelphia, Attorney; Samuel W. Pringle, Pittsburgh, Attorney; Irving Rand, Portland, Attorney; Donovan O. Peters, San Francisco, Attorney; J. W. McAfee, St. Louis, Former Judge of Circuit Court; John J. Nangle, St. Louis, Attorney; William H. Stead, St. Louis, Dean, School of Business and Public Administration, Washington University; Milton W. King, Washington, Attorney.

SUMMARY OF AWARDS

Boston. William Deitch and Pauline Goldberg, Weymouth Theatre, Weymouth, Mass., and Paramount Film Distributing Corporation, Loew's, RKO, and 20th Century-Fox (*3-6F-41*).

Intervenor: Hancock Theatre Company.

The complainants are a partnership operating a theatre known as the Weymouth Theatre in Weymouth, Massachusetts. The exhibitor claimed that the 28-30 day clearance granted the Strand, Quincy, and Alhambra theatres in Quincy, Massachusetts, was unreasonable and complainant requested that it be reduced to 14 days. The Arbitrator found that the existing clearance was unreasonable and reduced it to 21 days.

Buffalo. Nunzio Tantillo, Sarah Tantillo, Rose M. Scura and Nina C. Montesano, a co-partnership doing business under the trade name of Cuba Theatre, Cuba, N. Y. and 20th Century-Fox, Loew's Paramount, RKO, and Vitagraph (*16-1F-42*).

Intervenors: Bordonaro Bros. Theatres, Inc., Warner Bros. Circuit Management Corp.

The exhibitor claimed that the 30 days clearance granted the State and Haven Theatres in Olean, New York, operated by Warner Bros. Circuit Management Corporation, and the 14 days clearance granted the Palace Theatre in Olean, New York, over the complainant's Cuba Theatre, nineteen miles away, was unreasonable. The complainant asked that the clearance be reduced to "immediately after" any one of the three named Olean theatres. A General Stipulation was entered into by all parties, except Vitagraph, Inc. requesting the Arbitrator to enter an Award fixing the maximum clearance to be granted by the distributors, except Vitagraph, Inc., to the Palace, State and Haven theatres over the Cuba Theatre at 14 days. The Award, however, was applicable only to the State Theatre, Olean, in respect of those pictures which play first run in the State Theatre, Olean.

Buffalo. Dipson Theatres, Inc., Buffalo, New York, and Paramount, Loew's Vitagraph, RKO, 20th Century-Fox (16-5F-41).

Intervenor: Buffalo Theatres, Inc.

The exhibitor claimed that the clearance granted the Kensington Theatre was unreasonable and asked that the availability enjoyed by the Bailey Theatre prior to its acquisition by Dipson Theatres, Inc. on August 1, 1939, be restored. It developed during the hearings that up to 1939 the complainant's theatre and the Kensington Theatre both had the same availability, that is, 30 days after first run downtown Buffalo, but from 1936 to 1939 the Kensington played 7 to 11 days after the Bailey Theatre. Immediately upon the change in the management of the Bailey Theatre, the Kensington began to play 1 to 10 days ahead of it. At the time of the hearings Vitagraph sold one-half of its product to the Kensington on a 30-day availability with 7 days clearance over the Bailey, and one-half to the Bailey with 7 days over the Kensington. RKO, Paramount, and Loew's granted the Kensington 7 days over the Bailey. 20th Century-Fox sold the Bailey a run immediately after the Kensington. In his award the Arbitrator found that the clearance was unreasonable and commented that the Bailey Theatre had the greater grossing possibilities. He directed that the maximum clearance which Vitagraph, RKO, and 20th Century-Fox might grant the Kensington Theatre should be 3 days, thus establishing its priority. He dismissed the complaint against Paramount and Loew's, Inc.

On appeal: Decision pending.

Chicago. William Pearl, Alcyon Theatre, Highland Park, Illionis, and 20th Century-Fox, RKO (5-9F-41).

Intervenors: Sam C. Meyers, doing business as Teatro Del Lago, Glencoe Theatre Corp., A. J. B. Theatre, Inc.

The exhibitor complained that the distributors involved granted the Lake Forest Theatre Company, Inc., Samuel Meyers, doing business as Teatro Del Lago, and the A. J. B. Theatre, Inc., unreasonable clearance over the complainant's Alcyon Theatre. The Arbitrator found that the clearances involved were reasonable and dismissed the complaint.

On appeal: Decision pending.

Chicago. Ray Jarman, Don Theatre, Downers Grove, Illinois, and Paramount, RKO, 20th Century-Fox, Vitagraph, Loew's (5-11F-41).

Intervenors: George Zulas, doing business as the Westmont Theatre, Balaban & Katz Corp.

The exhibitor complained that contrary to Section VIII of the Decree the distributors involved were licensing their pictures to George Zulas for exhibition in his Westmont Theatre at Westmont, Illinois, and to Balaban & Katz Corporation for exhibition in its Tivoli Theatre at Downers Grove, Illinois. He stated that the clearances granted were unreasonable and requested that the Arbitrator enter an Award fixing the maximum clearance between the theatres involved in accordance with the principles enumerated

in Section VIII of the Consent Decree. The Arbitrator found that the clearance complained of was unreasonable and reduced it to be not in excess of twenty-four hours.

Cincinnati. Central States, Inc., Olentangy Theatre, Columbus, Ohio, and Loew's, RKO, 20th Century-Fox, Vitagraph (4-4F-41).

The exhibitor complained that clearance of 66 days after first run was imposed upon its theatre while its competitor, the Hudson Theatre, less than a mile away, had a 52-day availability and was granted clearance over complainant's theatre. Complainant requested the same availability as the Hudson Theatre, namely, a reduction of the first run clearance to 52 days and the elimination of the clearance in favor of the Hudson Theatre. The Arbitrator found that the clearance complained of was not unreasonable and dismissed the complaint.

Dallas. Overton Amusement Co., Inc., Overton, Texas, and MGM, 20th Century-Fox, RKO, Vitagraph (7-4F-41).

The exhibitor claimed that the 60-120 days clearance granted the Strand and Gem theatres, operated by Jefferson Amusement Co. or East Texas Theatres, Inc. was unreasonable. He requested that the clearance be eliminated and that he be given the right to book pictures on the day following the first showing in the Strand or Gem Theatres. The Arbitrator found that the present clearance of 60 days was unreasonable and reduced it to 14 days.

Dallas. B. R. McLendon, The State and Texan Theatres, Atlanta, Texas, and MGM, 20th Century-Fox, RKO, Vitagraph (7-5F-41).

The exhibitor claimed that clearance of 30-60 days granted the Paramount and Strand Theatres in Texarkana, Texas, operated by Paramount-Richards, Inc. was unreasonable. He requested that this clearance be entirely eliminated. The Arbitrator held that the complainant had not sustained his complaint and dismissed the case.

Appeal: The Appeal Board reversed the Award of the Arbitrator. It fixed the maximum clearance which may be granted to the Paramount and Strand Theatres in Texarkana over the State and Texan theatres in Atlanta, Texas, in licenses hereafter entered into at one day after first run Texarkana.

Detroit. R. G. Taylor, Southlawn Theatre, Grand Rapids, Michigan, and Loew's, RKO, Vitagraph, 20th Century-Fox (8-7F-41).

Alyce Cornell, Galewood Theatre, Grand Rapids, Michigan, and Loew's Vitagraph, 20th Century-Fox, Paramount (8-8F-41).

Intervenor: W. S. Butterfield Theatres.

The two theatres involved were owned by separate parties but the complaints in the Demands were the same and they were consolidated for convenience. Each complainant alleged that the first run theatres in Grand Rapids, operated by W. S. Butterfield Theatres, Inc., received 60 days clearance over Butterfield's second run theatres. Second run received 7 days

over third run, and third run received 7 days over fourth run. The fourth run Savoy Theatre, a member of Cooperative Theatres of Michigan, Inc. had 7 days clearance over the two complainants' fifth run theatres. Both complainants alleged that by contract these clearances compelled them to wait a minimum of 80 days after first run. Complainants further alleged, however, that in actual practice they had to wait not less than 95 to 150 days after first run. In their original Demands for Arbitration the complainants asked that the maximum clearance between first run and their fifth run theatres should not exceed 60 days, and that the clearance between the intermediate runs be shortened accordingly without disturbing the sequence. Both complainants amended their Demands for Arbitration to ask for a reduction in the clearance to 7 days instead of 60 days. After two hearings Awards were entered upon the consent of all parties fixing the clearance of first run over second at 45 days; the clearance of second run over third at 7 days; the clearance of third run over the Savoy Theatre at 7 days; and the clearance of the Savoy over complainants' Southlawn and Galewood theatres at one day. The Awards further provided that the availability of the Southlawn and Galewood should in no event be later than 21 days after the completion of third run.

Los Angeles. Banducci & Lemucchi Theatre Co., River Theatre, Oildale, and Arvin Theatre, Arvin, California (*9-4F-41*).

The exhibitor claimed that the distributors had granted unreasonable clearance to first and second run Bakersfield over its River Theatre at Oildale. First run Bakersfield was granted 42 days over second run Bakersfield and the latter was granted 14 days over complainant's River Theatre at Oildale. The complaint asked that clearance in favor of all runs in Bakersfield be limited to 42 days. In addition, complainant asserted that 28 days clearance granted first run Bakersfield over its Arvin Theatre was unreasonable and asked that this clearance be reduced to 21 days if the Arvin charged 30¢ admission. The Arbitrator found that the present clearance was reasonable and dismissed the complaint.

Memphis. Cotton Boll Theatre, Lepanto, Arkansas, and Paramount, RKO, 20th Century-Fox, Vitagraph (*25-3D-41*).

The exhibitor complained that the distributors had offered their product upon terms calculated to defeat Section VI. Prior to a hearing the complaint was withdrawn against RKO Radio Pictures, Inc., Vitagraph, Inc., and during the course of the hearing the complaint was withdrawn against Paramount Pictures, Inc. and 20th Century-Fox Film Corporation. The complaint having been withdrawn as to all defendants the Arbitrator declared the proceeding closed.

Detroit. Sol Winokur, Ritz Theatre, Watervliet, Michigan, and Loew's MGM, 20th Century-Fox (*8-5F-41*).

Intervenors: Heart Theatre (Fred E. Pennell), Loma Theatre (Mrs. C. C. Alguire).

The exhibitor claimed that Loew's, Inc. refused to license him pictures for exhibition at the same time as theatres located in Hartford and Coloma,

Michigan, but insisted on giving those towns seven days clearance. He further alleged that Vitagraph, Inc. insisted on a 14 days clearance. Complainant asked that the distributors named be required to sell his theatre without clearance in favor of the other towns. The three theatres involved in this complaint are all located on U. S. Highway No. 12, within a distance of seven miles. The Heart theatre at Hartford and the Loma Theatre at Coloma have been in operation for fifteen to twenty years. The complainant's theatre was opened in 1938. All theatres are about the same size and charge the same admission prices. It was admitted that they were highly competitive. The Arbitrator found that the clearances were not unreasonable and dismissed the complaint.

New York. M. F. Theatre Corp., Kisco Theatre, Mt. Kisco, New York, and RKO, Vitagraph, 20th Century-Fox, Loew's, Paramount (1-19F-41).

Intervenor: White Plains Hamilton Corp. (Operating Keith's Theatre), Suburban Theatre Corp.

The exhibitor complained the 7 days clearance granted first run White Plains was unreasonable and requested that it be eliminated. The complaint was dismissed as to RKO and Loew's, Inc. because of their respective interests in the Keith and State Theatres in White Plains. The Arbitrator found that the 7 days clearance was reasonable and dismissed the complaint against the remaining defendants.

A Notice of Appeal was filed by the complainant but before briefs were filed the complainant abandoned the Appeal.

New York. Cedar Operating Company, Inc., Strand Theatre, Astoria, Long Island, and Paramount, Loew's, RKO, 20th Century-Fox, Vitagraph (1-18D-41).

Intervenors: Island Theatre Circuit, Bilyon Amusements, Inc.

The exhibitor claimed that the distributors refused to license their pictures on a run in accordance with Section VI. It developed during the hearing that all five distributors refused to sell the run requested but offered last run in Astoria, Long Island, because the 1940-41 product had already been fully contracted for by existing theatres in the district. The complainant refused that offer because it believed that it could not operate profitably on last run. The Demand for Arbitration was filed twelve days before the Strand opened. The Arbitrator in his Award and Opinion expressed his disappointment because the Decree under Section VI did not give him the opportunity of granting the complainant relief. He dismissed the complaint without prejudice to the complainant's right to renew the Demand after experience had provided the necessary proof of disastrous consequences for the complainant's theatre under the terms and conditions of the run designated for that theatre by the defendant distributors.

Philadelphia. Broad Amusement, Inc., Broad Theatre, Philadelphia, Pennsylvania, and RKO, Paramount, Vitagraph (11-9F-41).

Intervenors: Warner Bros. Circuit Management Corp., Rockland Amusement Co.

The exhibitor stated that its theatre competed with the Logan, Bromley, Grange and Rockland theatres and was compelled to exhibit pictures after all of them. Its availability was 28 days after the Logan, 21 days after the Rockland, 14 days after the Bromley, and 7 days after the Grange. Complainant requested that a maximum clearance of 7 days after the Bromley and Grange be established. The Arbitrator held: (1) the 28 days clearance of the Logan over the Broad was not unreasonable; (2) the clearance of the Rockland over the Broad should be 14 days; (3) the clearance of the Bromley and the Grange over the Broad should be 7 days; (4) the Award should apply to all licenses thereafter entered into and subject to the provisions of Section XVII to them existing franchises to parties to the Decree; and (5) the Award should not apply to Vitagraph so far as clearance granted by it to its affiliated Logan, Bromley, and Grange theatres was concerned.

Pittsburgh. David N. Green, Owner, Beacon Theatre, Pittsburgh, Pennsylvania, and 20th Century-Fox, Paramount, Warner Bros., MGM, RKO (12-3H-41).

Intervenors: Warner Bros. Circuit Management Corp., Northeastern Theatres, Inc.

The exhibitor brought this proceeding under Section X, alleging that the distributors refused to license him except after the Manor and Squirrel Hill theatres. He asked to have pictures licensed on the same run as these two theatres. At the beginning of the hearing the complaint was withdrawn insofar as it related to the Manor theatre. The complainant satisfied all the jurisdictional requirements of Section X except the ultimate issue as to whether the refusal to license the Beacon Theatre on the run requested was arbitrary and in fact because the Squirrel Hill was a circuit theatre. The Arbitrator held that the refusal to grant the Beacon the run requested was justified and was not because the Squirrel Hill was a circuit theatre, and dismissed the complaint on the merits.

Portland. W. A., Wm. and Eda Graeper, Graeper's Egyptian Theatre, Portland, Oregon, and Paramount Film Distributing Corp., Loew's, Vitagraph, RKO, 20th Century-Fox (30-2F-41).

Intervenors: Multnomah Theatres Corp., Paraport Theatre Leasing Corp., Rainier Theatres Corp., Majestic Amusement Co., Williamette Amusement Co., Broadway Amusement Co.

The exhibitor alleged that all runs subsequent to first, as well as some of the first runs, which held clearance over complainant's theatre, were owned by subsidiaries of National Theatres Corporation. Complainant alleged that the 91 days clearance granted the first run theatres over the fifth run Egyptian theatre was unreasonable and asked that the maximum

clearance be fixed at 45 days. The complainant's fifth run availability was 91 days after first run and the availabilities of second, third, and fourth run are respectively 49, 67, and 81 days after first run. Extensive negotiations resulted first in a General Stipulation by which the Demand was dismissed without prejudice. Several days later, however, the Arbitrator, pursuant to a Stipulation, reopened the proceedings against Paramount, Vitagraph, RKO, and the intervenors. An Award was entered by consent against these three distributors fixing: (1) the availability of second run in Portland at 42 days after the close of first run, or the close of the third week of first run, whichever was earlier; (2) the availability of third run at 14 days after the first availability of second run, second run having 14 days to play and clear; (3) the availability of fourth run at 14 days after the first availability of third run and (4) the availability of fifth run at 7 days after the first availability of fourth run.

St. Louis. Floyd Lowe and W. A. Snell, doing business as The Star Theatre, Lebanon, Missouri, and Loew's, Paramount, RKO, 20th Century-Fox, Warner Bros. (*20-6D-41*).

The exhibitor claimed that the distributors had refused to license their product to complainant's theatre. The complaint against 20th Century-Fox and Vitagraph, Inc. was withdrawn prior to the first hearing and after one hearing the Arbitrator entered an Award dismissing the complaint against the remaining defendants.

St. Louis. Mildred Karsch, doing business as The Ritz Theatre, Rolla, Missouri, and Loew's, Paramount Film Distributing Corp., RKO, 20th Century-Fox, Warner Bros. (*20-5D-41*).

The exhibitor claimed that the distributors refused to license their product for exhibition in the Ritz Theatre and because of this refusal the complainant was unable to operate the theatre. The Arbitrator found that the distributors had refused to offer a run consistent with Section VI and entered an Award directing the defendant distributors to offer a run in accordance with the provisions of Section VI.

St. Louis, Victor Thien, Palm Theatre, St. Louis, Missouri, and Paramount, 20th Century-Fox (*20-4F-41*).
Intervenors: St. Louis Amusement Co.

The exhibitor claimed that the clearance granted the Union and Aubert theatres was unreasonable and requested the Arbitrator to enter an Award fixing a reasonable and equitable clearance between the theatres. The complainant's Palm Theatre followed the Aubert by 7 days and the Aubert followed the Union by 14 days. On pictures not shown at the Union, the Aubert had 14 days clearance over the Palm. The Arbitrator found that the existing clearances were not unreasonable and dismissed the complaint.
On appeal: Decision pending.

San Francisco. Piedmont Theatre, Inc., Oakland, California, and Paramount, RKO, 20th Century-Fox, Loew's, Vitagraph (13-4F-41).

Intervenors: Oakland-Berkeley Theatres, Inc., West Coast Theatres, Inc. of Northern California, Transbay Theatres, Inc., Solano Theatre Corp., Alameda County Theatres.

The exhibitor claimed that the theatres operated by subsidiaries of National Theatres Corporation and others received unreasonable clearance over its Piedmont theatre. It further alleged that this clearance is made more unreasonable by computing the time after the move over rather than after the first run in Oakland. Complainant asked that a reasonable clearance be fixed and that the measuring of first run clearance from the close of the move over engagement be abolished. Piedmont Theatre played 60 days after first run Oakland. The Arbitrator in his Award found the clearance unreasonable and awarded that the maximum clearance granted to the Chimes and Grand Lake theatres as fourth run theatres over the Piedmont as a fifth run theatre should be one day and that when a move over occurred clearance should be computed not from the close of the move over engagement but from the close of the engagement at the first theatre. He further held that Section XVII did not exempt from his jurisdiction the clearance granted by 20th Century-Fox to its affiliated theatres, including the Grand Lake and the Chimes.

On appeal: Decision pending.

Washington. Linden Theatre Co., Inc., Baltimore, Maryland, and Vitagraph, Paramount, RKO (14-8F-41).

Intervenor: Metco Theatres, Inc.

The exhibitor claimed that the clearance of 14 days granted the Metropolitan Theatre be declared unreasonable and a reasonable clearance be fixed. It was alleged that the contracts between complainant and the distributors required the Linden to run not less than 14 days after the Metropolitan and on the same availability as the Fulton. Pictures were available to the Metropolitan in the first week of availability (21 days after first run) and to the Linden in the third week. The Arbitrator found that the 14 days clearance was not unreasonable and dismissed the complaint.

On appeal: Decision pending.

MANAGEMENT AND LABOR

War Shipping Administration and Unions Reach Agreement. An agreement between the War Shipping Administration and the marine workers' unions, settling the long-standing dispute between the unions and the government maritime agencies, was announced on May 14 by Rear Admiral Emory S. Land, Administrator. Existing collective bargaining agreements remain in force, under which wage provisions may be reopened at certain intervals as provided in the contracts. At the same time representatives of the unions concerned reiterated pledges to refrain from strikes for the duration of the war.

Labor's No-Strike Pledge. William Green and Philip Murray, Presidents respectively of the American Federation of Labor and the Congress of Industrial Organizations, after a conference with President Roosevelt, disclosed that organized labor had yielded its right to strike during the war and substituted the processes of collective bargaining, conciliation, mediation or operations of the National War Labor Board to settle controversial questions between management and labor.

Effect of No-Strike Agreement. In an address before the National Society of Professional Engineers at Atlantic City on April 18, John R. Steelman, Director of the U. S. Conciliation Service, declared that the pledge of labor and management for full cooperation and continuous production has been 99.97 per cent successful. Mr. Steelman stated that in the previous three months' period the case load of the Conciliation Service had been doubled, which he declared not to be an indication of an increase in strikes, but rather of an increase in management-labor cooperation.

A few days later, William H. Davis, Chairman of the National War Labor Board, stated that organized labor's "no-strike policy" had been more successful than any other method the world has ever seen. Despite the fact that employment on war materials had nearly quadrupled in 1942, as compared with a similar period in 1941, strike idleness in relation to war production in the first quarter of 1942 was one-fifteenth of the corresponding period of last year.

Arm for Arbitration. Daniel J. Tobin, President of the Teamsters' Union, in stressing the new era in labor relations in which strikes will be outlawed, advised the locals of his organization to hire statisticians so as to be prepared properly to present union demands to arbitration. Said Mr. Tobin: "The organization that goes on strike and refuses arbitration will be made to suffer by public opinion and by Government order."

Labor Goes on the Air. Organized labor realized an old ambition on April 25, when the American Federation of Labor and the Congress of Industrial Organizations jointly took over a fifteen-minute period of NBC's network time. The two organizations will alternate in producing regular weekly programs under the title *"Labor for Victory"* each Saturday night from 10:15 to 10:30, with the promise that labor partisanship will be eliminated from the broadcasts.

Labor Sets Up Special Procedure for Jurisdictional Disputes. A procedure for settling union jurisdictional disputes, generally conceded to be the most difficult to handle, that may come before the National War Labor Board has been set up by joint agreement between William Green, President of the AFL, and Philip Murray, President of the CIO. The plan will function for the duration of the war and will apply to disputes between unions within each organization, as well as between unions of the two groups.

In announcing the plan, William H. Davis, Chairman of the War Labor Board, said that under the procedure worked out, all jurisdictional questions in cases coming before the Board will be referred as a matter of course to the labor members of the Board for adjustment. If any particular dispute cannot be settled by the labor members, Mr. Green and Mr. Murray will be so notified and will thereupon appoint a group or an individual to make a final and binding determination of the dispute.

Labor Executives Join Association's Board of Directors. Emil Rieve, Vice President of the Congress of Industrial Organizations, and Matthew Woll, Vice President of the American Federation of Labor, have been elected to the Board of Directors of the American Arbitration Association. In announcing their

election on April 23, Lucius R. Eastman, Chairman of the Association's Board of Directors, said:

> "With representatives of both labor and management guiding the policies of the Association's Voluntary Industrial Arbitration Tribunal, a real service is being rendered by the Association to the nation by providing impartial arbitration facilities for the immediate settlement of differences as they arise. The election of these two outstanding representatives of labor to the Board is another important step forward in the development of arbitration during this war period. Their judgment and wide experience within the labor movement will be of the greatest aid to the Association in advancing the use of voluntary arbitration."

During the past year, 114 unions affiliated with one or the other of the organizations represented by the new Directors have used the facilities of the Industrial Arbitration Tribunal.

Labor Relations Staff for Navy Department. The Navy Department has established a small staff of labor relations men who will be attached in an advisory capacity to the Commandants of the twelve Naval Districts, and who will be expected to improve industrial relations practices in navy contracts, take a hand in threatening disputes and advise the Commandant as to labor policy. The Navy does not expect to take on conciliation activities, but will continue to call upon the U. S. Conciliation Service where necessary.

The Army has adopted a more centralized procedure in its labor relations activities, and has a labor relations unit which is headed by Edward F. McGrady, former Assistant Secretary of Labor.

Arbitration Proceeding Produces Victory Committee. The Industrial Arbitration Tribunal was recently directed by the parties to discontinue a pending arbitration proceeding between the Wholesale and Warehouse Workers Union, Local 65 of the United Retail and Wholesale Employees of America, and an importer of millinery. The reason: The parties had adjusted their controversy and had formed a "Victory Committee," consisting of representatives of the millinery industry and the Union. The function of the joint Committee is to contribute the industry's best effort to the war program and to adjust all differences in conference.

Wage Increases Paid in War Savings Stamps and Bonds. The war effort received impetus recently from an arbitration award, a negotiated labor contract and a voluntary increase granted to workers, in which wage increases will be paid in war savings stamps and bonds.

In granting an increase in wages to 1,500 employees of the textile converting industry of New York City, in a proceeding in the Industrial Arbitration Tribunal of the American Arbitration Association, Col. William P. Cavanaugh, arbitrator, announced on May 14 that at the request of the Union membership, one dollar per week of the increased wages granted in his award would be deducted for the purchase of war savings stamps. . . . . In a contract negotiated between Local 325, Cooks, Countermen's and Soda Dispensers Union (AFL) and Dubrow's Cafeteria, Brooklyn, it was stipulated that 9 per cent of the weekly increase should be paid by the company in war savings stamps.

Shoe salesmen of the Stewart-Brooks Red Cross chain of stores will receive wage increases in war bonds as a result of negotiations which the employers voluntarily entered into with the Union, because of rising living costs, although not compelled to do so under the agreement which runs until September 1, 1942. Fifty employees will receive $25 war bonds at the end of each month, and another group of 25 members will receive bonds at the rate of $25 every one and a third months.

Voluntary Surrender of Union Rights. Three unions in New Jersey (Local 15, Industrial Union of Marine & Shipbuilding Workers, CIO., and two locals of the Iron Molders, Core Workers and Foundry Workers Union, AFL) voluntarily waived rights to double time for work on Sundays and holidays. . . . . In New York, Local 3, of the International Brotherhood of Electrical workers, AFL., relinquished the six-hour day it won in 1936 and agreed to put its 17,000 members in the construction, maintenance and service fields, on an eight-hour work schedule.

Grievance Board for New York Transit System. The Grievance Board of the New York City Transit System got under way in February, when the Board received its first grievances and complaints for adjustment. Members of the Union, at whose re-

quest the Grievance Board was established, look forward to more speedy and favorable action on disputes which formerly accumulated in considerable numbers.

Joint Committees to Speed War Production. The General Electric Company has set up joint committees of management and labor, to be known as "war production speed-up committees," for the purpose of accelerating output, in cooperation with the United Electrical, Radio and Machine Workers of America. In addition, each plant will have a number of departmental committees which will consider suggestions from employees for the purpose of speeding up production. . . . . Similar action affecting thirty plants of the Westinghouse Electric and Manufacturing Company has been agreed upon.

Poor Vision. In Pittsburgh, early in March, 350 workers went on strike over a man's eyeglasses. One of the union stewards had ignored for a year repeated requests to have his eyes examined and fitted with glasses. When he nearly had an accident because of his eyesight the company laid him off for two weeks, and the strike resulted.

Appointments. Robert Abelow, a member of the Labor Panel of Arbitrators of the Industrial Arbitration Tribunal, who has served frequently in management-labor disputes submitted to the American Arbitration Association, has recently been appointed a Principal Mediation Officer of the National War Labor Board, and has taken up his duties with the Board in Washington.

Another appointment recently announced was that of Seymour Baskind, impartial arbitrator of the restaurant industry in New York City, who was named impartial chairman of the tire, battery, automotive parts and accessories industry, under a contract recently entered into by the industry and Local 21082, American Federation of Labor.

"Convoy" for Business. In an address before the Cincinnati Bar Association, Paul Fitzpatrick, Administrative Vice President of the American Arbitration Association urged the Bar to act as a "convoy" for business during this war period and make every effort to help in settling disputes between business and labor.

Recent Gallup Polls on Labor Questions. Two recent Gallup polls had to do with labor relations. On February 7 a poll of union members showed 61 per cent to be opposed to the "check-off"—the system under which the employer withholds dues out of the workers' pay and turns the money over to the union—and in favor of union collection of dues. . . . . In another poll on March 13, on the question: "Should Congress pass a law forbidding strikes in war industries until the war is over, or should workers in war industries continue to have the right to go on strike?", the vote was 86 per cent in favor of enactment of such a law, an increase of 13 per cent over a similar poll taken in November, just before the attack on Pearl Harbor.

Jurisdictional Dispute Arbitrated. A jurisdictional dispute, in which a strike threat was lifted from the Layne-Bowler plant in Memphis following President Roosevelt's plea for uninterrupted production of war materials, was submitted to arbitration by Dr. Whitley T. McCoy, Professor of Law at the University of Alabama, and resulted in a decision in favor of the AFL Molders' Union on the ground that the Union holds a valid closed-shop agreement with the Company which requires other workers to join the Union if they wish to continue to work.

Arbitration in Labor Contracts. Inclusion of arbitration provisions in collective bargaining agreements is shown by a recent analysis of such contracts by the Bureau of Labor Statistics of the Department of Labor to be steadily increasing. While less than half of the workers in the automobile industry were covered by arbitration provisions at the beginning of this year, more than half of the workers in the aircraft industry were covered. Arbitration clauses in labor agreements entered into in the rubber industry increased from one-third to one-half of such contracts. While the machinery industries showed little increase in the inclusion of arbitration clauses, the majority of those in the steel and electrical equipment industries provided for arbitration.

In an earlier analysis of *Employee Morale* by the Labor Relations Institute, of New York, announced in the *New York Times* on February 21, 1942, the following statement was made: "There are no figures available, but it is estimated by the Institute that more than 60 per cent of the nation's labor troubles

arise after a contract has been signed. The reason is simply that in many cases management and labor alike have failed to include proper provisions for dealing with future disagreements. In a recent survey of more than 3,000 contracts it was found that more than 70 per cent of them fail to contain vital clauses for shop rules, seniority, arbitration and adequate wage scale determination. Each of these has been a persistent stumbling block to harmonious relations."

Supreme Court Decisions Affecting Labor. The United States Supreme Court, on April 6, held that a sit-down strike by seamen aboard a vessel, even if moored at a dock in port, is mutiny, reversing a previous order of the National Relations Board. . . . . On March 30 the Court held that while New York State need not tolerate every variety of peaceful picketing, the courts could not enjoin peaceful picketing in a union drive against certain practices in peddling bakery products. . . . . In a Texas case it was held that the State could bar picketing when it was not related directly to the labor dispute. . . . . In a Wisconsin case it was held that the Wisconsin Employment Relations Board was not in conflict with the Wagner Act in ruling on a Milwaukee labor dispute, in which the State Board held a union guilty of unfair labor practices in mass picketing. . . . . In an Ohio case, the court interpreted the Wagner Act to mean that a company and a labor union could not agree on a closed shop contract after the company had aided the union with unfair labor practices. . . . . In California the U. S. Circuit Court of Appeals ruled that just because a union has a majority in a plant and claims the right to bargain collectively by reason of an election, it does not necessarily possess the right to bargain specifically for a closed shop; to do so it is necessary for the workers specifically to authorize their bargaining representatives on that very point.

ARBITRATION LAW AND DECISIONS

ARBITRATION AWARD HAS SAME STATUS AS VERDICT OF JURY

HERMAN TOCKER *

IN deciding a point of procedure governing appeals to the Court of Appeals of the State of New York, the Court of Appeals has given to an arbitration award the same weight as is given to the verdict of a jury after a trial in an action at law (*Fine* v. *Cohen*, 287 N. Y., Mem. p. 299, decided March 5, 1942).

The decision was made upon a motion on behalf of Sylvia Fine (who had obtained confirmation of an arbitration award) to dismiss the appeal from the decision of the Appellate Division confirming the award.

Sylvia Fine had obtained an award of $7,449.00 in an arbitration conducted in the Arbitration Tribunal of the National Federation of Textiles. Her attorney made the usual motion in the Supreme Court for an order confirming the award, and for leave to enter judgment on the award. The attorney for Herman Cohen & Co. made a cross-motion to vacate the award and have the matter submitted to new arbitrators. These motions were heard at Special Term of the Supreme Court, New York County, before Justice Hammer, who denied the motion for judgment on the award, vacated the award and directed that the matter be submitted to new arbitrators.

The attorney for Sylvia Fine appealed to the Appellate Division of the Supreme Court, First Department, from the orders vacating the award and denying the motion to confirm the award and enter judgment. The Appellate Division of the Supreme Court unanimously reversed the orders of Special Term and in its decision said:

> "The irregularities relied on by respondents are without substance and were waived by their voluntary participation in the arbitration proceeding, with knowledge thereof." (263 App. Div. 797.)

In its order reversing Special Term of the Supreme Court, the Appellate Division directed that the award of the arbitrators be

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confirmed, and that the clerk of the court enter judgment in behalf of Sylvia Fine for the amount of the award.

Appeals to the Court of Appeals of the State of New York are governed by specific statutory provisions, all of which are based upon the provisions of the New York State Constitution, creating the Court of Appeals and defining its jurisdiction. One of the sections governing appeals to the Court of Appeals as of right, is Section 588 of the Civil Practice Act (Subdivision 1), which provides that an appeal to the Court of Appeals may be taken:

> "As of right, from a judgment or order entered upon the decision of the Appellate Division of the Supreme Court . . . . where the judgment or order is one of reversal or modification." *

At first glance, it would appear that since the Appellate Division of the Supreme Court had reversed the Special Term orders (which Special Term orders had vacated the award, and denied the motion for leave to enter judgment thereon), the case comes squarely within the quoted section of the Civil Practice Act, and there having been a reversal, an appeal could be taken to the Court of Appeals as of right.

Upon a more careful examination of the sections of the statutes governing entry of judgments on arbitration awards, and of the previous rulings of the Court of Appeals governing appeals to that Court, it is quite apparent that the Appellate Division's action was not a reversal, but, on the contrary, was an affirmance of the award of the arbitrators. In dismissing the appeal in the *Fine* v. *Cohen* case, the Court of Appeals said:

> ". . . . The confirmation of the award was, in effect, an affirmance, and the appeal cannot be taken as of right."

If we analyze what happened here, and examine the statutes and authorities, this decision of the Court of Appeals becomes quite clear. Reducing the matter to its simplest form, we have a

* By Chapter 297 of the Laws of 1942, to take effect September 1, 1942, Section 588 has been amended as follows:

> "Appeal to the Court of Appeals as of right lies only:
>
> 1. From a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that . . . .
>
> (c) the appellate division direct a reversal or modification of the judgment or order appealed from."

trial, or a hearing before arbitrators. Presumably, the arbitrators consider all of the evidence and make their award. Their award is now ready to be reduced to judgment. The application is made to enter judgment, it is denied and a new arbitration is ordered. An appeal is taken to the Appellate Division. The Appellate Division reverses the order denying the application for judgment, confirms the award and directs the entry of judgment. In effect, the Appellate Division has not really reversed here, because it did not reverse any judgment. The only judgment in the case was the verdict or award of the arbitrators, and in confirming the award of the arbitrators, the Appellate Division affirmed, and did not reverse.

The application for judgment on an arbitrator's award is governed by Section 1464 of the Civil Practice Act. That section provides:

> "Upon the granting of an order confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this article."

This provision of the Civil Practice Act, which provides for the entry of judgment on an arbitrator's award in the same manner as upon a referee's report in an action, forms the fundamental basis for the decision of the Court of Appeals in the *Fine* v. *Cohen* case. It is settled law in New York that once a referee's report has been made, there is nothing further to be done by the Court except to perform purely ministerial acts involving the direction for and the entry of judgment (*Corr* v. *Hoffman*, 256 N. Y. 259 at 264; *Clapp* v. *Hawley*, 97 N. Y. 610 at 614; *Hancock* v. *Hancock*, 22 N. Y. 568; *Vogel* v. *Edwards*, 283 N. Y. 118 at 121).

Therefore, by judicial decisions, a referee's report is just like a jury's verdict, since, in either case, the court's function is purely ministerial and the entry of judgment on the verdict, or on the referee's report, is likewise purely ministerial. The function of the Court in connection with the granting of a motion for judgment upon an arbitrator's award is likewise hardly more than ministerial, because by Sections 1461 and 1458 of the New York Civil Practice Act, unless certain specific facts appear (Sec. 1462), the court "*must*" grant the order directing the entry of judgment.

The conclusion that when the Appellate Division reverses Special Term, and grants an order directing the entry of judg-

ment on an arbitrator's award, it merely affirms the award of the arbitrators, is based on the practice involving the reinstatement of jury verdicts by the Appellate Division, when the jury's verdict had been previously set aside by the court and a new trial granted.

The theory underlying the conclusion is fully set forth in *Markievicz* v. *Thompson,* 246 N. Y. 235. In that case, the court reviewed all of the cases over a long period of time and said:

> "By the settled practice of this court, a judgment of the Appellate Division unanimously reversing an order of the trial judge for a new trial, and reinstating the verdict, is tantamount to the unanimous affirmance of the judgment, and an appeal therefrom will be dismissed if taken without leave."

In that case, the Court of Appeals recognized a very fine distinction between a situation where the trial judge sets aside the verdict and orders a new trial, and a situation where the trial judge sets aside the verdict and dismisses the complaint. In the former case, there is no judgment in the record, except the jury's verdict, and the Appellate Division, when it reinstates the verdict, affirms the only judgment in the case, that is to say, the jury's verdict. In the latter case, where the judge has dismissed the the complaint after setting aside the verdict, there is a new judgment in the case, a judgment of dismissal, and when the Appellate Division reverses that, and reinstates the verdict, there is no affirmance, but there is a reversal of the only judgment in the case, the judgment of dismissal.

The same distinction is found in arbitration cases. In the *Fine* v. *Cohen* case, the Special Term vacated the award and ordered the matter to go before new arbitrators. Therefore, there was no judgment or final order in the case, and when the Appellate Division confirmed the award, they, in effect, affirmed the award. However, sometimes a judge, when refusing to direct the entry of judgment on an award, fails to remit the matter to new arbitrators. In that case, there is some basis for comparing it to the second situation above referred to, where the judge sets aside the verdict of the jury and dismisses the complaint. In fact, in at least two cases heard by the Court of Appeals where the Special Term Judge did not remit the matters to new arbitrators, and the Appellate Division reversed and reinstated the awards, the Court of Appeals heard the appeals as of right. These cases were *Stefano Berizzi Co. Inc.* v. *Krausz,* 239 N. Y. 315, and *Horowitz* v. *Kaplan,* 247 N. Y. 579.

It follows, therefore, that by its decision in *Fine* v. *Cohen* (which decision followed *Pine St. Realty Co. Inc.* v. *Coutroulas*, 258 N. Y. 609), the Court of Appeals has definitely raised the award of arbitrators to a status equivalent to that of a verdict of a jury, or the decision and report of a referee.

STATUS OF ENEMIES AND ALIEN ENEMIES IN UNITED STATES COURTS AND IN ARBITRATION PROCEEDINGS

JOSEPH MAYPER *

NATIONALS of Germany, Italy and Japan resident in the United States, under war-time proclamations, are alien enemies of the United States.

For purposes of the Trading with the Enemy Act (40 Stat. 411), as amended, an "enemy" or "ally of enemy" is defined by Section 2 to mean, broadly, any person (including the government) of any nationality, resident within the territory of, or the territory occupied by, any nation with which the United States is at war. The enemy character is determined not by nationality but by residence, place of business and incorporation. Under subdivision (c) of Section 2, the President is authorized, by proclamation, to include within the term "enemy" any individuals or class of individuals who may be natives, citizens, or subjects of any nation with which the United States is at war, *even though such individuals or class of individuals may be resident in the United States*, if the President shall find that the safety of the United States or the successful prosecution of the war so requires. No such proclamation has, as yet, been issued under Section 2(c) of the Trading with the Enemy Act, although various proclamations issued under the Alien Enemy Act [1] now govern the conduct to be observed by "alien enemies" resident in this country and authorize the apprehension and detention of those deemed dangerous to the public peace and safety of the United States. An "alien enemy" by operation of the Alien Enemy Act is not constituted an "enemy" under the Trading with the Enemy Act.

Section 7(b) of the Trading with the Enemy Act prohibits an "enemy," as defined therein, from prosecuting suits in any court

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[1] 50 U. S. C. 21 (1940).

within the United States prior to the end of the war.[2] Although "war suspends the right of enemy plaintiffs to prosecute actions in our courts," [3] since the President has not exercised the power vested in him under Section 2(c), no native, citizen or subject of any nation with which the United States is at war *and who is resident in the United States* is, at present, precluded by statute or regulations from suing in Federal or State courts.[4] Whether an *interned* alien enemy has the right to sue is not as yet clearly settled, since the President does not appear to have followed the World War I [5] policy under which all persons in the custody of the War Department were declared to be enemies. Pending the issuance of such a Proclamation, it is doubtful whether such an interned alien may not claim the right of a resident alien enemy.

An "enemy," as defined in the Trading with the Enemy Act, may defend, by counsel, any suit or action at law which may be brought against him.[6] Since an "alien enemy" resident in the United States may sue in Federal or State courts, he may obviously also defend any suit or action at law.

How do these rights and limitations affect an arbitration agreement to which one of the parties is an "enemy"? It seems clear that neither party to such an agreement can, by court action, compel the adverse party to proceed with the arbitration; the United States courts are not open to the enemy and the other party may not "trade" with or "perform any contract, agreement or obligation" with an enemy under Sections 2(c) and 3(a) of the Trading with the Enemy Act. Even if both parties are willing to proceed, the question remains whether, in the absence of any authoritative decision, the act of engaging in the arbitration

[2] "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war . . . . *and provided further*, that an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

[3] *Ex Parte Don Ascanio Colonna*, Supreme Court of the United States, January 5, 1942 (October Term, 1941).

[4] "Summarily stated, the law is this: While enemy subjects residing in enemy territory are under a disability to maintain actions in our courts, resident alien enemies are not, in the absence of explicit legislative provision to the contrary. Today, the only legislative restriction on the right to sue affects those persons defined as "enemies" within the meaning of the Trading with the Enemy Act." *The Georgetown Law Journal, March 1942*—"The Right of Resident Alien Enemies to Sue."

[5] Presidential Proclamation No. 1427, dated February 5, 1918.

[6] See note 2, *supra*.

would be characterized as coming within the above prohibitions. Should both parties to the agreement nevertheless proceed with the arbitration to final award, either party would, for the reasons referred to above, experience difficulty in obtaining the entry of judgment thereon.

Since an "alien enemy" resident in the United States retains, for the present, the right to sue and the right to defend in our courts, it seems clear that he retains also all of the rights and is subject to all of the obligations of any proper party to an arbitration agreement.

Money and property in the United States owned by an enemy or ally of enemy may be seized by the Alien Property Custodian and may be held by him or by the Treasurer of the United States. Under Section 9 of the Trading with the Enemy Act, any person not an enemy or ally of enemy claiming any interest, right or title therein may file with the Custodian a notice of his claim. Subject to various restrictions and limitations, the President, upon application, may order the payment or transfer to the claimant of the interest therein to which the President determines the claimant is entitled. The claimant is also given the right, under certain conditions, to institute a suit in equity in a District Court to establish the interest claimed and the Court may order its payment or transfer. Because of these specific statutory limitations, it would seem that any arbitration agreement entered into between the claimant and the enemy, at the time the transaction involving the subject-matter of the claim occurred, could not be enforced insofar as its effect on the Custodian of the enemy property is concerned.

All funds and property in the United States of an enemy may not be transferred, under Section 5(b) of the Trading with the Enemy Act and Executive Order No. 8389, as amended, except under licenses or regulations issued by the Secretary of the Treasury, and certain difficulties may be experienced in obtaining execution of any judgment entered against such a person.

The good offices of the Department of State may also be utilized for the collection, after the war ends, of any debt due an American citizen by an enemy. While there is no requirement that Americans having sums due them by nationals of enemy or ally of enemy countries shall furnish the Department of State with information in regard thereto, and while no action can be taken by the Department during the existence of a state of war, informa-

tion concerning such debts will be received by the Department for possible future adjustment. If such information is filed, the statement should set forth the name and nationality of the debtor, the name of the creditor, the date and manner of his acquisition of American citizenship, the amount of the debt due him and the date and manner in which the debt was incurred.

REVIEW OF RECENT COURT DECISIONS

WALTER J. DERENBERG

NEW YORK COURT OF APPEALS

Insertion of Arbitration Clause in Invoice Not Binding Arbitration Agreement. Appeal from an order of the Appellate Division affirming an order to compel arbitration and staying civil action. Petitioner had sold merchandise to the respondent on more than twenty occasions. The invoices sent by petitioner in connection with these sales contained an arbitration clause stamped thereon in red ink. It is alleged by the petitioner that these arbitration clauses constitute binding agreements "in writing" under Section 1449, C. P. A., while the respondent takes the position that the oral contracts which preceded the sending of the invoice made no mention of arbitration and that therefore the arbitration clause on the invoice was ineffective. The Special Term Judge found that:

> ". . . . a specific agreement exists between the parties to settle by arbitration all controversies arising from the sale of these goods,"

and ordered the parties to proceed to arbitration. The Special Term order was affirmed by the Appellate Division by a divided court. *Held*, the insertion of the arbitration clause in the invoices does not constitute a written arbitration agreement under Section 1449, C. P. A.

> "It is true that acceptance of a document which plainly purports to be a contract gives rise to an implication of assent to its terms despite ignorance of the content thereof (*Murray* v. *Cunard Steamship Co.*, 235 N. Y. 162; 1 Williston on the Law of Contracts (Rev. ed.), Secs. 90A, 90B). But that is not this case. An invoice, as such, is no contract. An invoice is a mere detailed statement of the nature, quantity and the cost or price of the things invoiced (*Sturm* v. *Boker*, 150 U. S. 312, 328, 340, 341; 17 Am. & Eng. Ency. of Law (2d ed.), pp. 478, 479).
>
> "Each of the transactions in question was executed in accordance with an agreement that had been made without mention by either party of the subject of arbitration. It was not until that stage had been reached in each instance that the invoice was made out and stamped with the words 'All controversies arising from the sale of these goods are to be settled by arbitration.' The whole question is thus one of the effect of respondent's silence in the face of such separate offers for arbitration, each of which looked back to a single sale and delivery theretofore made.

"The applicable principles have been stated by this court in this manner: 'A party cannot be held to contract where there is no assent. Silence operates as an assent and creates an estoppel only when it has the effect to mislead. . . . . When a party is under a duty to speak, or when his failure to speak is inconsistent with honest dealings and misleads another, then his silence may be deemed to be acquiescence. . . . . And it may be added that a person is under no obligation to do or say anything concerning a proposition which he does not choose to accept. . . . . There must be actual acceptance, or there is no contract'."

In re Tanenbaum Textile Co. v. *Schlanger,* (1942) 287 N. Y. 400, 40 N. E. (2d) 225.

APPELLATE DIVISION

Scope of Arbitration Provision in Agreement of Incorporation. Appeal from an order denying petitioner's motion to appoint an arbitrator. The parties own a corporation whose voting stock and management are divided between them equally. In a written agreement for the organization of the corporation, they provided that all questions, disputes and controversies between them concerning the policies of the management of its affairs should be settled by mutual agreement, and that any disagreement not provided for otherwise should be determined by arbitration. *Held,* order reversed.

"The arbitration clause was broad in its terms. The respondent has commenced a stockholder's derivative action in the right of the corporation, and in the complaint alleges that petitioner has deliberately wrecked the corporation and has wasted and disposed of its property without consideration. In our opinion, in view of the broad and unambiguous terms of the provision for arbitration, it was error on the part of the learned Special Term to deny petitioner's application for the appointment of an arbitrator whose appointment, upon the undisputed facts, is contemplated by the provision for arbitration."

Application of Carl, (1942) 32 N. Y. S. (2d) 410.

NEW YORK SUPREME COURT—SPECIAL TERM

Effect of Government Order on Enforceability of Arbitration Provision. Motion to stay an arbitration proceeding. Under two contracts between the parties it was provided that petitioner "hereby sells" and respondents "hereby purchase" a total of 300 bales of raw silk, delivery to be made during July, 1941, and that "every dispute, of whatever character, arising out of this contract must be settled by arbitration." Petitioner delivered in part only. It alleges that its failure to deliver the entire quantity is due entirely to governmental orders restricting the right to make and also the right to accept delivery of raw silk. *Held,* motion granted. The question of the legal effect of Government orders is for the Court and not for the arbitrators to decide.

"I am of the opinion that as the question is with respect to the effect of subsequent governmental action upon the liberty of action of both

> parties it is not a dispute arising out of their contract. It certainly is desirable that the construction and effect of such governmental orders be determined by regularly constituted courts rather than by arbitrators."

Matter of Cohn-Hall-Marx Co. (*Stern & Stern Textile Importers, Inc.*), Sup. Ct., Spec. Term, Part I, N. Y. L. J., January 27, 1942, p. 399, Walter, J.

Award—Lack of Acknowledgment. Motion to confirm an award. Objection was made because of the fact that the award was not acknowledged as required by law at the time of its execution. *Held,* motion granted. The award was acknowledged subsequent to its execution, so that this technical defect must be considered cured. *Matter of Verly Building Corp.* (*Gertner*), Sup. Ct., Spec. Term, N. Y. L. J., January 22, 1942, p. 336, Witschief, J.[1]

Effect of Cancellation of Principal Contract on Arbitration Clause. Motion to stay an action in the Municipal Court. It was alleged by the respondent that the principal contract containing the arbitration clause had been cancelled by agreement and consent of all parties involved. *Held,* motion granted to the extent of directing a trial of the preliminary issue of cancellation.[2] *Agostini Bros. Bldg. Corp.* v. *Sherman Plastering Co.*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., January 15, 1942, p. 215, Koch, J.

Effect of Government Order on Performance of Arbitration Award. Motion to confirm an award. Respondent has asked the Court to deny the motion on the ground that certain governmental orders by the Office of Production Management in relation to the processing of raw silk made it impossible for it to make the deliveries required under the award and render the contract, including the arbitration provision, illegal, unenforceable and void. *Held,* motion denied.

> "What the conclusion would be if the premise of impossibility were factually established need not be here considered, for it certainly is not established upon this record. There is no showing whatever that respondent did not have on hand already manufactured a quantity of satin sufficient to fulfill its contract without processing any raw silk

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[1] A motion to reargue this case was denied on January 30, 1942 (Sup. Ct., Spec. Term, Part I, N. Y. L. J., p. 469, Witschief, J.). In denying the motion the court pointed out that the failure to acknowledge the award is an omission or irregularity not affecting the merits of the controversy, which is subject to correction under Sec. 1462A. "The correction has been made, and unless the form is to be unduly exalted over the substance, the defect should be disregarded."

[2] The identical issue was raised in the recent case of *Matter of Sullivan* (*Bldg. Service Employees Int'l. Union, Local 32-B; L. J. Phillips & Co., Inc.*), Sup. Ct., Spec. Term, Part I, N. Y. L. J., March 5, 1942, pp. 965-6, Eder, J. In answer to a motion to compel arbitration it was alleged that by mutual consent the principal contract had been terminated and cancelled. The Court referred the issue of the existence of an arbitration agreement under such circumstances to preliminary trial.

whatever, and hence without violating any of the governmental orders here set forth. It is even fairly inferable that the arbitrators based their award upon a finding that respondent could have delivered without processing any raw silk."

Matter of Chevette, Inc. (*Anchor Fabrics Corp.*), Sup. Ct., Spec. Term, Part I, N. Y. L. J., January 27, 1942, pp. 399-400, Walter, J.

Joinder of Issue in Civil Action Not Waiver of Arbitration. Motion to compel arbitration. It was alleged by respondent that petitioner had waived the right to invoke the arbitration provision because it had joined issue in a City Court action. *Held,* motion granted. The agreement to arbitrate was set forth in the answer in the City Court action by way of defense and this is enough to keep the arbitration provision alive and no waiver of arbitration can be found under such circumstances (Nagy v. Arcas Brass & Iron Co., 242 N. Y. 97; Chapman-Kruge Corp., 239 App. Div., 795). *In re Arnheimer, Inc.* (*Drotver*), Sup. Ct., Spec. Term, Part I, N. Y. L. J., February 18, 1942, p. 739, Eder, J.

Stay of Arbitration Until Determination of Simultaneous Action for Rescission of Principal Contract. Motion to compel arbitration. The principal contract between the parties contained an arbitration clause and also provided that:

"No suit at law or in equity based on such dispute or controversy shall be instituted by either party hereto other than to enforce the award of the arbitrator or arbitrators."

Despite this provision respondent commenced a civil action asking the Supreme Court to rescind the principal contract for misrepresentation and fraud. Petitioner alleges that these issues should be decided in the arbitration proceeding and that the action for rescission should be stayed. *Held,* motion to compel arbitration denied.

"The respondent here proceeded properly in bringing suit for rescission, and is entitled to stay the petitioners from seeking arbitration until the suit for rescission is determined, rather than that petitioners are entitled to stay that suit in order to proceed with arbitration here under the very agreements sought to be rescinded. Upon that point it seems to me that application of *Manufacturers Chemical Co.* (259 App. Div. 321, 19 N. Y. Supp. (2d) 171, appeal dismissed 283 N. Y. 679) is controlling. There it was sought to stay arbitration until the validity of certain contracts was determined, each of which contracts contained an arbitration clause, which it was sought to enforce. From an order denying the application to stay arbitration, the Appellate Division of this department, in reversing the order, said: 'Our conclusion is that the petitioner is entitled to a trial with respect to the allegations in the petition concerning the making of the misrepresentations, their falsity and petitioner's reliance thereon. If proved, the petitioner is in a position where it rightfully has rescinded the contracts. If this be so, no arbitration may be had, since the provision therefor in each contract would fall with the contract itself.'

> "It seems clear to me, therefore, that upon all the elements considered, and upon the authorities referred to, that this application should not prevail. Accordingly, the motion is denied in all respects."

Matter of Jacoby (Dezsoefi), Sup. Ct., Spec. Term, Part I, N. Y. L. J., February 27, 1942, p. 873, Eder, J.

Industrial Arbitration—Misconduct of Arbitrator in Refusal to Consider "Distress Plea." Motion to confirm an award and cross-motion to vacate same. The sole issue submitted to the arbitrator was the question of wages. With regard to determining this question, Section 21 of the agreement between the parties provided as follows:

> "In applying the standards of wages and hours, said Administration Board shall have the power to grant relief not inconsistent with the spirit and purpose of this agreement, with respect to wages and hours for any particular building or the employees thereof where such action is deemed necessary to prevent undue hardship, injustice or inequality to the owner or the employees thereof."

The employer alleged that he was entitled under this claim to interpose a distress plea before the arbitrator at any time in the course of the arbitration prior to the making of the award. In this case the distress plea was advanced when the hearing before the arbitrator was half over. The Union objected to the interposing of the distress plea at such time and the arbitrator held that he could not consider the distress plea. *Held,* motion to vacate the award granted. Section 21 was obviously intended to operate as an equitable concomitant to the other provisions of the agreement between the parties.

> ". . . . hence it is properly invocable by the owner or employee as the case may be, at any time during the progress of the arbitration and at any time prior to the actual rendition of an award by the arbitrator."

Matter of Sullivan (Bldg. Service Employees Int'l. Union, Local 32-B; L. J. Phillips & Co., Inc.), Sup. Ct., Spec. Term, Part I, N. Y. L. J., March 5, 1942, pp. 965-6, Eder, J.

Arbitration Clause Binding on Member of New York Stock Exchange after Termination of Membership. Motion to compel arbitration and to stay a civil action. This controversy arises out of an agreement entered into by the parties when both were members of the New York Stock Exchange and had agreed to be bound by the constitution of the Exchange. The respondent claims that the arbitration provision in the by-laws of the Exchange with regard to controversies between members or allied members of the Exchange has no application after a member has resigned from the Exchange, while petitioner claims that the arbitration clause survives such resignation with regard to transactions entered into before that time. *Held,* motion granted.

> "The fact that the respondent commenced the action after he ceased to be a member of the exchange, assuming this to be the fact, does not

destroy the obligation assumed by him while he was a member of the exchange."

In re Satorious (Filston), Sup. Ct., Spec. Term, Part I, N. Y. L. J., April 3, 1942, p. 1385, Shientag, J.

Waiver of Irregularity in Administering Oath to Arbitrator by Continuing with Arbitration Proceeding. Motion to vacate an arbitration award on the ground that an error was committed in administering the oath of the arbitrator. *Held*, motion denied. Such error was a mere irregularity which was cured by the continuation of the arbitration without objection thereto. *Matter of Cia. De Las Fabricas De Papel De San Rafael y Anexas, S. A. (Gottesman & Co., Inc.)*, Sup. Ct., Spec. Term, Part I, N. Y. L. J., April 13, 1942, p. 1552, Shientag, J.

No Injunction Lies against Instituting of Arbitration Proceeding. Petition to issue an injunction against the instituting of arbitration proceedings. Petitioner asserts that the provision in a fair trade agreement for arbitration of all disputes among members was unconstitutional and invalid as unlawful restraint of trade. *Held*, petition denied.

> "While an action may be stayed where by agreement the dispute is to be arbitrated, there is no corresponding authority to issue an injunction in a summary proceeding against arbitration. Statutory authority exists for a proceeding to compel arbitration, but there is none for a proceeding to prevent one except as incident to or the result of an independent action."

Nagel v. Kasdan & ano., Sup. Ct., Spec. Term, Part I, N. Y. L. J., April 1, 1942, p. 1368, Levy, J.

APPELLATE COURT OF ILLINOIS

Appraisal—No Enforceability if Palpably Excessive. Action to recover upon an award of appraisers under an automobile collision insurance policy and counterclaim to set the award aside for fraud. Plaintiff and defendant insurance company were unable to agree upon the amount of loss or damage done to plaintiff's automobile in an accidental collision. In accordance with the provisions of the insurance policy, the question of the amount of damage was submitted to three appraisers, two selected by each party and the third by the two thus appointed. The agreement between the parties provided that the award of any two, in writing, should determine the matters submitted for appraisal. The appraisers, after having been sworn, made an award to the effect that the loss or damage sustained by the plaintiff was $829. This action was brought to enforce the award. In its counterclaim the defendant alleged, *inter alia*, that the award of damages was so grossly in excess of plaintiff's actual damages as to amount to fraud. In remanding the case to the lower court, which had dismissed the counterclaim, the Court remarked:

> "Where arbitrators recite in their award that they disposed of a matter intrusted to their consideration in the manner required by the

agreement for submission, it cannot be shown by parol evidence that arbitrators disposed of such matter in another and different manner."

Hetherington v. *Continental Ins. Co. of New York*, 37 N. E. (2d) 366 (1941).

COURT OF APPEALS OF KENTUCKY

Appraisals Valid and Binding. It was provided in an automobile insurance policy issued to plaintiff by defendant that any damage or loss claims should be submitted to appraisers. When plaintiff's truck was damaged by fire and the parties could not agree on the extent of damage, both parties appointed an appraiser and these two determined the amount of damage to be $330. When this action was brought against the insurer for $500 instead of $330, the insurer set up the fact of appraisal and the payment of the ascertained loss as a defense. The Court, in giving judgment in favor of the insurance company, held that the appraisal was binding between the parties and that the company had discharged its liability under the contract. In discussing the binding effect of the appraisal, the Court said:

"This court has, as have a majority of courts in other jurisdictions, by their endorsement thereof, encouraged settlements by compromise or arbitration, and construed applicable law liberally to uphold awards thus made, where there is no showing of fraud or mistake. Our court has held that when an award is made under arbitration, its effect is as binding on the parties, if within the scope of the agreement, as is the judgment of a civil court of jurisdiction."

And again:

"We have also held that the common law right to submit controversies has not been repealed by statute. Section 69, *et seq.*, Ky. Stats.

"In the absence of any showing that the requirements of the statute were not strictly followed, we may assume that they were, though this is immaterial, as shown clearly by reference to *Miller* v. *Plumbers Supply Co.*, 275 Ky. 647, 122 S. W. (2d) 477. That this court favors arbitration and settlements thereunder when fairly made, see *Deshon* v. *Scott's Adm'r*, 202 Ky. 575, 260 S. W. 355; 3 Am. Jr. 950, Sec. 129."

General Exchange Ins. Corporation v. *Harmon*, 157 S. W. (2d) 126 (1942).

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Industrial Arbitration—Ex Parte Investigation as Misconduct. Proceeding to squash an arbitration award. The State Board of Conciliation and Arbitration had awarded a 7 per cent increase in wages to loomfixers employed by the petitioner. The award is attacked, *inter alia*, on the ground that toward the conclusion of the hearing the Board indicated that it would appoint one of its employees to investigate the question of work load. The Board thereupon actually directed an industrial relations adjuster to make an investigation and report to the Board. Such investigation was made and the report handed to the Board without the petitioner being given an opportunity

to examine the investigator upon his qualifications or to study the report. *Held*, award vacated. The award made by the Board is invalid.

> "It is clear that the board acts as a quasi-judicial tribunal. Nothing could be treated by the board as evidence which was not introduced as such and we cannot say that the report of T., which was made to the board before the hearing was concluded, and which was not exhibited or made available to petitioner, may not have been an important factor in the conclusion reached by the board. While doubtless the board was acting in good faith and in an honest effort to render a just decision, we are of the opinion that it is apparent on the face of the return that petitioner was not given that full hearing to which it was entitled and that the board erred as a matter of law in receiving and considering the report of T. without affording petitioner an opportunity to meet that evidence.
>
> "For this reason, as well as for failure to decide both questions submitted to it for arbitration, the award of the board is invalid and the proceedings must be squashed."

Boott Mills v. *Board of Conciliation and Arbitration*, not yet officially reported; unofficially reported in Daily News Record, April 14, 1942, at p. 6.

SUPREME COURT OF IOWA

Consultation with Arbitrator Before Appointment Not Misconduct. Suit in equity to set aside an arbitration award on the ground of mistake, fraud and misconduct. The complaint alleged, *inter alia*, that the defendant had held conferences with one of the arbitrators without the presence of plaintiff's representatives or the other arbitrators. It was also claimed that the arbitrator S., the defendant's appointee, was not a fair and qualified arbitrator and that he had been employed by the defendant as auditor and accountant. The submission to arbitration between the parties provided as follows:

> "Now, therefore, it is hereby agreed by and between the parties hereto that the purchase price of said stock shall be determined by a Board consisting of E. L. S. and C. N. H., and a third person to be selected by them, who shall proceed at once to determine the real value of said stock.
>
> "It is further agreed . . . . that a decision of a majority of said board as to the real value of said stock shall be final, conclusive and binding upon the respective parties hereto. And first party hereby agrees to sell and second party agrees to purchase said stock at the price so fixed, forthwith. . . . ."

In accordance with this agreement the arbitrators handed down a written award determining the value of the stock involved. *Held*, judgment of the lower court confirmed and complaint dismissed. It is not misconduct on the part of a person, to whom application is made to act as arbitrator and who afterwards consents to do so, to inquire of the party at the time of

the request about the general nature of the controversy in relation to which his services are wanted.

> "A person cannot be expected to accept such an office with no idea as to the character of the duties which it will involve, or whether it may be within the scope of his powers or knowledge to fulfil them." (Citing Morse "On the Law of Arbitration and Award," p. 535.)

On the question whether a party may select its own accountant as arbitrator, the Supreme Court ruled as follows:

> "All authorities agree that any person whomsoever may be chosen to fill the position of arbitrator. Morse, *supra*, p. 99; 6 C. J. S. Arbitration and Award, p. 186, Sec. 46; Redman's Law of Arbitration and Awards, 4th Ed., p. 111. It may not be the wise thing to do, but no legal reason suggests itself to us why the two parties may not choose a third person to act with them as a board of arbitration. Choosing arbitrators wholly disinterested is an admirable standard to aspire to, but the parties seldom do that, and if all awards were set aside in which it was not done, few awards would stand. Arbitration has always been considered as an inexpensive method of speedily and finally settling a matter upon which the parties have not agreed. It has these advantages, but like any other method of trial the result may not satisfy either party. We have already set out what this court has said must be shown to annul such an award. It is a sound rule and we have no inclination to change it or depart from it."

First National Bank in Cedar Falls v. *Clay*, 2 N. W. (2d) 85 (1942).

SUPREME COURT OF PENNSYLVANIA

Housing Authority's Agreement to Arbitrate Results in Statutory Arbitration under the Pennsylvania Arbitration Act—Judicial Review of Statutory Awards. Appeal from a judgment setting aside an arbitration award. The petitioner, T. Construction Co., had entered into a contract with the Philadelphia Housing Authority for the building of one thousand houses. The contract provided, *inter alia*, as follows:

> "No claim for any extra work will be allowed because of alleged impossibilities in the production of the results specified or because of inadequate or improper plans and specifications and wherever a result is required, the successful bidder shall furnish any and all extras and make any changes needed to produce, to the satisfaction of the Local Authority, the required result."

In the course of building it appeared that the designated kind of paint could not be used, but that oil paint had to be employed instead of cement water paint. The question whether the contractor was entitled to be compensated for the extra cost was submitted to arbitration under the general arbitration clause of the contract. The arbitrators' award allowed the T. Construction Co. $20,709.22, which was set aside by the lower court on the ground that under the plain words of the contract the arbitrators had no authority to award extra compensation. The Construction Co. now alleges

that the lower court's decision should be set aside because the arbitration was a common law arbitration with the result that the arbitrators were final judges of both law and fact and that the award was not subject to even limited review by the court, as provided in the Arbitration Act of 1927. The Housing Authority alleged that the arbitration must be considered a statutory arbitration and that an award which exceeded the contractual authority of the arbitrators should be set aside.

Held, judgment vacating the award confirmed. It is clear beyond doubt from the language of the contract that the contractor should not be permitted to maintain any claim for extra cost. Had claim been made for the extra cost by the contractor in the ordinary way of civil action, the Court would have been required to give binding instructions against it. The fact that the parties resorted to arbitration does not alter the situation and enable the contractor to recover his claim. The arbitration here was not a common law arbitration but was governed by the Arbitration Statute of 1927, even though the statute is not expressly referred to in the agreement. Section 16 of the Act of 1927 provides that the act shall apply to any written contract to which the Commonwealth of Pennsylvania, or any agency or subdivision thereof, or any municipal corporation or political division shall be a party.

> "By the 10th section of the Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. Sec. 1550, the Authority is declared to be an agency of the Commonwealth. With this legislative declaration in view, it is impossible to conclude that the law-making body did not intend that all arbitrations provided for in contracts with the Commonwealth or its agencies should be under the act."

The Court then concludes that being a statutory award, Section 11(d) of the Act applies, according to which it was provided that the Court may vacate or modify an award where the award is against the law, and "is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict. . . . ." *Philadelphia Housing Authority v. Turner Const. Co.*, 23 Atl. (2d) 426 (1942).

SUPREME COURT OF GEORGIA

Misconduct of Arbitrator and Error of Law as Reason to Set Aside Arbitrators' Award. Appeal from a judgment entered upon an arbitration award and dismissing certain exceptions thereto. The parties submitted to arbitration under the Georgia Law a dispute concerning ownership of a certain tract of land. Three arbitrators were appointed and an award handed down after due hearings. The award is attacked as going beyond the terms of the submission and, therefore, illegal. It was also alleged that the award was grossly and palpably against the evidence. *Held,* judgment reversed. It was erroneous to dismiss the objection to the award of the arbitrators. The lower court "molded into a solemn pronouncement of the court an adjudication as to matters the determination of which had not by the parties been submitted to the arbitrament of the arbitrators." It is true that the bare statement to the effect that the award was the result of fraud or mistake

would not be a sufficient basis for an application to vacate it. It is not sufficient to state in general terms that the award is the result of accident, mistake or fraud or is generally illegal. Here, however, the exceptions filed pointed to several instances of uncontradicted evidence which the arbitrators allegedly overlooked. Said the Court:

> "It is true that where questions of law are expressly referred to arbitrators a mere erroneous decision by them of such question ordinarily constitutes no cause for setting aside their award. Forbes v. Turner, 54 Ga. 252. Nothing of the kind, however, was done here."

Barnes v. *Avery*, 16 S. E. (2d) 861 (1941).

U. S. CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Scope and Effect of Arbitration Clause under Federal Arbitration Act. The charter party contained a clause providing for arbitration in New York of any claim or of any dispute "of any nature whatsoever," the arbitrators to be "commercial men." Despite this clause, petitioner instituted a libel against respondent for breach of the charter party and procured an interlocutory order from the lower court for the recovery of damages therefor. Respondent alleged that the entire civil proceeding should be stayed and submitted to arbitration, including the issue of whether a valid agreement existed between the parties or had been repudiated. *Held*, interlocutory order reversed and remanded. Arbitration agreements should be given a liberal interpretation because the Federal Act, as well as many state arbitration laws, indicate a new orientation and a new approach regarding arbitration. Said the Court:

> "In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration."

Even in view of such liberal interpretation, however, the issue of the existence of a valid arbitration agreement must be decided by the Court. Under the wording of the Federal Act, arbitrators cannot decide the issue of their own jurisdiction, even if the agreement were so worded as to confer such authority upon them.

The Court further ruled that the issue of breach of contract and amount of damages should be referred to arbitration before "commercial men" as provided in the contract. As to the claim that commercial men were not appropriate persons to compute such damages, the Court said:

> "In truth, it is precisely this sort of case where arbitration of damages by 'commercial men' may be peculiarly useful, as they are likely to be more familiar than the average lawyer who serves as special master with the relevant background of international shipping in the state of world affairs as of the period covered by the charter party."

Kulukundis Shipping Co., S/A. v. *Amtorg Trading Corp.*, 126 Fed. (2d) 978 (March 1942).

ARBITRATION SPEAKS FOR ITSELF

THE following is a list of periodical literature on various phases of arbitration, mediation, conciliation and labor relations generally that has come to the attention of the JOURNAL since publication of the previous issue:

Commercial:

The First Year of Arbitration; BOX OFFICE, February 21, 1942.
Arbitration in Action, by Walter A. Stewart; SPIRITS, February 1942.
Arbitration Works, by Lucius R. Eastman; PURCHASING, March 1942.
Watch Your Disputes, by J. A. Phillips; HOUSTON MAGAZINE, April 1942.
Try Arbitrating, by Bernard Summer; LAUNDRY AGE, April 1942.
Western Hemisphere Won, by Eugene F. Sitterley; BUFFALO BUSINESS, April 1942.

Labor:

A Diagnosis of War Labor Policy, by Wm. M. Leiserson; LABOR RELATIONS REPORTER, February 18, 1942.
Recent Proceedings under the Industrial Disputes Investigation Act; LABOUR GAZETTE (Canada), January 1942.
Labor Disputes Settled While You Wait, by G. L. Blumenschine; FOOD INDUSTRIES, March 1942.
The Association's Recommendations as to Labor Legislation; AMERICAN BAR ASSN. JOURNAL, March 1942.
Judicial Review of Awards by the Railway Adjustment Board; YALE LAW JOURNAL, February 1942.
The N. Y. Labor Injunction Statute and the Courts; CALIFORNIA LAW REVIEW, Jan. 1942.
Current Labor Problems: I. The View of Labor, by Isadore Katz; *II. The View of Industry,* by John C. Gall; *III. The View of Government,* by Robert Ramspeck; IOWA LAW REVIEW, Vol. 27, No. 3, March 1942.
Three Avenues to Industrial Peace; What Labor Wants; Meet the Mediator; JOURNAL OF INDUSTRY AND FINANCE, Jan., Feb. and March, 1942.
Highlights of Our National Labor Policy, by Robert B. Watts; IOWA LAW REVIEW, Vol. 27, No. 2, January 1942.
A-B-C's of British Labor Policy; BUSINESS WEEK, April 4, 1942.
Collective Bargaining in Government Enterprise, by Joseph A. Padway; *New Problems Facing the Labor Lawyer,* by Lee Pressman; *The Labor Law Conference,* by Benedict Wolf; LAWYERS GUILD REVIEW, Vol. II, No. 2, March 1942.
Open Door Grievance Plans, by O. C. Cool; AMER. BUSINESS, March 1942.
Reinstatement and Back Pay—The Phelps, Dodge Case, by Milton H. Feinberg; COLUMBIA LAW REVIEW, Vol. XLII, No. 3, March 1942.
Voluntary Arbitration—A Vital Cog in Wartime Machinery; GREATER PITTSBURGH, March 1942.

SECTION OF DOCUMENTS

ANNUAL REPORT OF THE AMERICAN ARBITRATION ASSOCIATION FOR 1941

As this Report could not be written by the President of the Association, C. V. Whitney, who is now in the military service of his country, it is dedicated to the year of his service as President in which such great progress was made under his leadership.

THE Report for 1941 symbolizes the close of an era in the history of American commercial arbitration and the opening of a new front in industrial arbitration.

The past quarter of a century of peace between two great world wars has witnessed the quiet planning and methodical building of a great new structure of organized arbitration on the basis of beneficent and liberal arbitration laws.

It has seen the beginning of a science of arbitration in which its philosophy, principles, standards and practice have begun to take form.

This era has seen the great United States and inter-American and Canadian-American systems of arbitration span the western hemisphere.

It has seen the growth of education and systematic instruction in the use of these systems, with research to open up new vistas and initiate new experiments.

This era has witnessed the creation of one of the most extraordinary bodies of men in history—not to be found except in a Republic of free institutions and generous ideals. They are the Panels of Arbitrators of the Association. Approximately 10,000 of the finest citizens of the United States and its most distinguished leaders in all walks of life belong to this corps of volunteers. They serve without compensation, and are ready at all times to lay aside their gainful occupations in order to render service in the cause of justice.

This era has also produced, in the Board of Directors and in the members of the Association, an organization of high responsibility. At many times during the year their combined judgment or separate experience and wisdom are brought into action upon new problems or questions of policy. It is because of their ready response that the Association in its history of handling more than 20,000 cases and in laying the foundations of arbitration systems throughout the Western Hemisphere, can point to so few errors or mistakes in its administration.

We now pass from peacetime building to wartime action, when the full strength of this Association is being called upon for war service.

THE DESIGN OF 1926

In closing this era of peace and in embarking upon a war program, one last look at the design begun in 1926 is not without interest.

When the Association was organized in 1926, arbitration was like mustard seed scattered across the wide expanse of the Americas: here and there it had found shelter for sparse growth; some few industrial groups had offered it temporary and often hazardous shelter; chambers of commerce had rather hesitantly opened their doors; and once in a while a law office door opened wide enough to let out a submission or other arbitration agreement. In rare instances, as in the Chamber of Commerce of the State of New York, arbitration had been allowed to live a long and secure life, thereby keeping intact its lifeline from early colonial days to the time of modern industrial organization.

That it possessed a national significance for the country or was developing according to a national policy could not be said, for in the far places where pioneers were still hewing the forests and constructing railroads and building new homesteads, that is, in the great Middle West, Northwest and Southwest, arbitration still lay slumbering in the swaddling clothes of early English common law.

The American Arbitration Association was the first national organization of a non-partisan, non-political, non-profit-making and wholly disinterested character to arrive on this general scene. With a vision of what arbitration could mean to this country and the western world, it was called upon to find an architect to plan and design a structure. All around it lay an abundance of material, not only in the wisdom and experience of those who held various segments, but in the materials themselves. There were laws and decisions, predating by many centuries the Victorian era; there were ethical codes and standards and rules hewn by trade groups out of their own needs and experience; there were beginnings of a practice. These unsorted materials were of all kinds and sizes and they were scattered widely over the United States. Some were in good condition, while others were beyond repair; some important pieces were missing, while others were superabundant.

But there were also obstacles to the construction of these odds and ends of marvelous building material into a durable structure. Inherent among them was a pride of possession and the flint-like quality of unchanging tradition. There was also the granite-like substance of precedents and a visible grain of self-interest. There was also a lack of faith in arbitration itself—a not unusual characteristic of a buffeted-about, not-much-wanted waif from juridical chambers.

The new Association undertook to fashion out of this wealth of material a national system of commercial arbitration. Later, this was expanded into an inter-American system, a Canadian-American system, and an international system through collaboration with the International Chamber of Commerce and its National Committees. The underlying theme of the design was that wherever American commerce flowed, there arbitration should be found, and wherever written contracts carried that trade, they should also carry arbitration with its accompanying goodwill and good faith. In this way it was planned that trade routes from producer to final consumer should be kept free of the hazards of disputes, misunderstandings, grievances and reprisals.

From 1926 to 1933 was the building period of the American system; from 1933 to 1937 that of the Inter-American system; from 1938 until now

that of the Canadian-American system. The international system, begun in 1938, has been halted by the war, but its essential foundations remain for the post-war reconstruction period.

THE SCIENCE OF 1941

As the Association saw its task, its first undertaking was to make a complete survey of all available materials and to enlist the best possible assistance. In its *Year Book* of 1927 appeared a complete description of available materials and the names of 300 vice-chairmen chosen from different lines of industry. Thus, the national commercial arbitration system of today belongs to American industry which collaborated so generously in its construction.

But out of this early construction came something unforeseen by the earlier builders and that was the beginning of a science of arbitration. It was soon found that, without this, the new structure, as had others before it, would dissolve or disintegrate under the pressure of use or changing conditions. For this purpose, the enduring principles of arbitration had to be regathered, rearranged and restated; they had to be put to work and retested in the furnace of modern industry; the findings had to be formulated as established standards. In other words, the organization and expansion of the knowledge of arbitration became of fundamental importance. This involved a vast undertaking of research and analysis and its ultimate presentation in a basic literature on arbitration which would give it a recognized position of its own in the national life.

In its first publication (1927), the *Year Book on Commercial Arbitration*, and its last publication (1941), *Arbitration in Action*, is shown the span between disorganized, casual and haphazard arbitrations and the systems that now prevail on the western hemisphere. In these two publications appears the distance between the vague resolutions of goodwill and incomplete practice, so prevalent in 1926, and the Motion Picture Consent Decree, so scientific in its compass of the fourth largest industry in the United States.

Within the last four years, arbitration has attained the distinction of having a Journal of its own so there is now a continuing record of the thought, philosophy, practice and development of this new science—an achievement not attained by arbitration at any other time or place.

It is not enough in the construction of a new science to organize its existing knowledge and provide a basic literature. There must be new experiments and new findings and formulations and new inventions. So the Association has constantly expanded its tribunals, from commercial to industrial, and included experiments in new fields, like that of accident claims. From the many thousands of cases submitted are drawn the problems and their solution, the new aspects and questions and inventions necessary to meet changing economic conditions. These come out of the actual turmoil of hardly fought cases and out of the wisdom of the men who decide them. From these argued points, considered evidence and vitally important interests flow constant streams of new ideas, theories and proposals for further experiments. It is the disputing parties and the contending lawyers that bring to this new science the challenge so necessary

to its constant progress. Covering, as these cases do, all kinds of controversies, settled in many different countries and participated in by many different types of persons with widely different points of view, these laboratories are teeming with experiments and findings that are being incorporated as part of the new science.

Nor has the Association neglected instruction. Having the literature and the laboratories, it has been possible to organize instruction and to provide the source material. This material has taken the form of recommended courses of instruction in schools, colleges or universities or it has been furnished for lectures or to teachers. It has also included material for theses, or studies for discussional purposes. This field of instruction is opening rapidly and its expansion is indispensable to an understanding of arbitration.

THE ORGANIZATION OF TRIBUNALS

As so often happens with new projects or ideas, operating plans often lag far behind. Arbitration was no exception. For centuries, it persisted without tribunals, panels of arbitrators, rules of procedure or the appurtenances of the least of the sciences or arts.

Men were slow to realize that arbitration had definite needs of its own, not unlike other instruments for the dispensation of justice. Without established courts, for example, the dispensation of justice, the adjudication of claims and the maintenance of peace and order would be virtually impossible. Without ready access to these courts, men would increasingly resort to force to settle their claims. Without orderly procedure, the process of dispensing justice would be very haphazard and unequal. Without administrative service, courts would function badly.

It was the privilege of the Association to supply similar facilities for arbitration. First, it set up a national system of commercial arbitration for the United States. This system now covers 1,600 cities and is in process of expansion. Then it established a national panel of arbitrators to man these posts. It then supplied rules of procedure and improved the laws. Finally, it provided an administrative service, thus giving stability and uniformity to this system. Then through the Inter-American Commercial Arbitration Commission, the Association collaborated in establishing similar facilities for the Americas, and later for Canadian-American commerce. Today the structure is practically laid and it is possible to assure to commercial contracts the settlement of any trade dispute arising under them on the western hemisphere.

In 1933, following conferences with the President Justice of the Municipal Court and the Superintendent of Insurance of the State of New York, the Association entered the wide field of controversy covered by accident claims and property losses. During this period 11,170 claims have been referred to arbitration by insurance companies, defendants and complainants and plans are under way for its expansion to other cities.

In 1937, the Association extended its activities to labor relations and established an Industrial Arbitration Tribunal and a procedure for inquiry. To this Tribunal have been submitted nearly 800 cases and innumerable inquiries and questions. To it daily come matters arising out of the hundreds of labor agreements that provide for the services of the Association. It is

the only organization that lays down basic policies under established rules of procedure which carefully differentiate the judicial processes of arbitration from the bargaining processes of conciliation and mediation.

The machinery of these systems follows a pattern all its own and was evolved out of the early survey and subsequent laboratory experiments. In all respects it keeps faith with the principles of self-regulation, economy and speed that characterize the earliest forms of arbitration. This is accomplished through the device of maintaining machinery out of which the parties create their own tribunal, select their own arbitrators, govern their own proceeding and under which the arbitrators, without direction, suggestion or partisan control of any kind, arrive at their decisions. The Association, as a corporation, and its officers and directors, are quite separated from an arbitration proceeding through established rules which alone govern the proceeding.

ORGANIZATION OF PANELS OF VOLUNTEERS

A certified arbitrator is something new in modern commercial and industrial relations. If, however, there is to be confidence and faith in systems of arbitration, there must be available a body of men who are known to be competent in their field, free from bias, and capable of arriving at a just decision based upon evidence before them.

Knowing this to be an indispensable adjunct of any effective system, the Association began to assemble national and special panels of arbitrators to fill these specifications. It searched for them the country over, learned their qualifications, checked their records and then tested them, as far as possible, in its tribunals. It also trains them to an understanding of arbitration and its application and sets high standards of ethical duties. But it also provides for their challenge and removal or withdrawal in the event bias is disclosed during a proceeding; and gives the parties the privilege of accepting or rejecting them on grounds satisfactory to them. There is a prevailing belief that selection from its panel carries with it an assurance of competence and fairness and unapproachability by persons seeking to influence a decision. When such, as rarely happens, fails to be the case, there is no hesitancy whatever in dispensing with membership on the panel. To fail the parties in their trust is to fail the Association in adherence to its known standards and training. The fact that no decision of a member of this panel has been attacked on the ground of bias evidences the care with which members of panels are chosen.

The arbitrators serve without compensation or publicity or other reward. The remarkable fact that several thousand such volunteers comprise the Panels, and willingly serve, is helping immensely today in the war service being offered by the Association, for it possesses the only permanently trained corps of arbitrators.

The members of these panels are more than panel members; they are the educational vanguard of arbitration, they really know its principles and how arbitration works; they speak with the authority of experience; they are the apostles of the new science of which they are such an integral part. Into this group of volunteers, the Association pours its assembled knowledge, the results of its laboratory experiments, and the accumulated wisdom drawn from its many cases and contacts throughout the Americas.

ORGANIZATION OF EDUCATION

Although the Association has established machinery, provides arbitrators and makes tribunals readily accessible, it is primarily concerned in teaching men how to use arbitration by themselves, without recourse to its tribunals. The Association is primarily interested in teaching men how to anticipate and control future disputes; and how to avoid the crisis that calls them into a tribunal. It is for this reason that so much of its effort is devoted to spreading the use and knowledge of arbitration clauses in contracts under which disputes are foreseen and a pacific method of settlement is provided. It is for this reason that rules of procedure and careful instructions are sent to all of its known clause users.

THE MOTION PICTURE CONSENT DECREE

The outstanding event in peacetime activities of the Association has been the adoption of arbitration by groups and the establishment of self-supporting systems over which the Association has been named as administrator. The outstanding example is the system of commercial arbitration in which the Government and a whole industry are participants. The Consent Decree, under which the American Arbitration Association is directed to administer a system of Tribunals for the settlement of disputes between producers and exhibitors, is, in effect, a code of fair trade practice. For the administration of this system, the Association has set up and directs 31 Tribunals in different parts of the country under a special grant of funds from the Motion Picture Producers for carrying on this work.

Important as is the actual disposal of complaints in these Motion Picture Tribunals, the Association is interested in this new development of arbitration because it is the first experiment of its kind and, therefore, presents quite new problems. It may well forecast a new type of arbitration in which the Government may even more widely participate. To the Association it is a challenge to lay sound administrative foundations for this new type of arbitration.

Whether or not this experiment succeeds, it is a great historic document; for under it the respective rights of an industry and Government are defined and a way worked out for cooperation. Instead of prosecuting, the Government is cooperating; instead of dictating, Government is collaborating; instead of exercising its own authority, Government is offering self-regulation; instead of new and drastic laws, great guiding principles of amity are laid down.

AMERICAN DEFENSE UNIT

Early in 1941, it became increasingly clear that war was coming closer to American shores. The President of the Association, C. V. Whitney, established a special American Defense Fund, for the purpose of enabling the Association to carry arbitration into each defense industry. This plan has been carried out and several thousand industries have been supplied with arbitration clauses, both commercial and industrial, and with procedural information and general knowledge of arbitration. Unquestionably,

the campaign inaugurated by the Association to drive disputes out of defense industries, accounts in considerable measure for the upward swing of arbitration throughout the country.

Another factor in this growth was the impetus given arbitration by the "full speed ahead" signal when the tribunals of the Motion Picture Arbitration System were thrown open to full use for wartime arbitrations, thus establishing thirty additional arbitration centers in key cities throughout the country from which arbitration could be piped to every defense industry and made available to every management-labor group in dispute. This great service to a country, then plunged into defense production, was possible through the generous cooperation of the Motion Picture Producers.

Later, when the United States entered the war, an already efficient national system of arbitration had been supplemented by thirty branch offices, each equipped with hearing rooms and other necessary facilities, and with a corps of trained arbitrators.

Mr. Whitney's contribution has been continued as a War Service Fund for 1942, and activities under that Fund will be one of the leading subjects of the 1942 Report. Not the least important of the work undertaken in this field is the promotion of arbitration provisions in Government contracts and in subcontracts and the great progress in the history of arbitration is seen in the responding friendliness of government toward the use of arbitration.

THE CHALLENGE OF INDUSTRIAL ARBITRATION

When the Association, in 1937, extended its work to industrial arbitration, it believed the same opportunity for planning and methodical development might be afforded for industrial arbitration as had occurred for commercial arbitration; and that it might be studied, analyzed and organized along equally sound lines. In the few years preceding preparations for defense, some of this groundwork was possible, resulting in a foundation of principles and practice.

Defense organization and the war precipitated the demand for labor arbitration and in 1941 its use far outstripped the technical competence and organization developed by the Association. The Association has, therefore, addressed itself to two things: 1) To carrying arbitration knowledge and practice to each war industry and to each point where war production might be delayed by disputes. 2) To meeting an increasing demand for service and information.

Under the first activity, the menace of disputes between management and men has been recognized for the serious danger it is, and arbitration has gone into action, on a priority basis, on every industrial front in the United States.

Under the second activity, the increasing number of cases referred to the Tribunal is topped in importance by the fact that only in less than 2 per cent of the cases has there been a refusal by either side to abide by the arbitrator's decision or an attack upon the award in the courts, and in no case has a court reversed an award.

THE WAR PERIOD

The last month of 1941 witnessed another change in the work of the Association—its transition from defense to war activities. This change is profound; arbitration was changed into a militant power for winning the war. In the field of labor relations, the President of the United States has given priority to procedures for negotiation and arbitration adopted by parties or provided in their labor agreements. This has greatly stimulated voluntary effort.

The impact of war conditions, conversion of industries and the speedup of production have been reflected in the type of questions that have come to the Tribunal for adjustment in recent months. Disputes involving increased costs of living and wage adjustments, shortage of goods and the effect of priorities on labor contracts, basic crews and work assignments, changes of policy, continuous operation of plants and effect on overtime pay, flare-ups among workers of different national backgrounds, are among the matters referred to arbitration. During the year the Tribunal received its first case arising out of a jurisdictional dispute between two CIO unions, and also the first matter which arose out of the effect on wages and working conditions of shortage of raw materials caused by Government priorities on rubber.

In the field of commercial relations, the conversion of industries and the transfer of contracts from private industry to war production had led arbitration to knock at the doors of government for inclusion in government contracts. A notable example of this is the inclusion of an arbitration provision in the contracts between the U. S. Maritime Commission and shipbuilders who are building $3,000,000,000 worth of Liberty Ships. Another example is a standard form of sub-contract used by an entire industry, formerly engaged in manufacturing household equipment, but now making anti-aircraft gun parts. In both of these contracts, the American Arbitration Association is named.

The increase in buying in the United States by the United Nations has brought arbitration actively into foreign purchasing contracts. The Purchasing Commissions of Great Britain, Canada and Australia include an American Arbitration Association clause in their contracts, as does Amtorg Trading Company, and cases have arisen under some of these contracts.

Arbitration that heretofore has always been strangled in war is now a rallying cry for speed and more speed, for self-effort and more self-effort, for faith and more faith, and for cooperation and more cooperation. This tremendous upsurge of arbitration comes from the democratic realization that force will speed bullets but cannot make them; and that force will crush the enemy but cannot unite our own men in a common effort. It comes from the profound conviction that self-regulation and the smooth running of free enterprise pile up more fighting machines and fighting men than do the law or the lash.

And so passes from the American scene the passive arbitration of yesterday. So arises the arbitration of tomorrow that takes the offensive, with its militant power and technique, to sustain the present and deal with the

future. It is no longer arbitrate *or* fight. It is arbitrate *and* fight. To hold a permanent place in the organization of a future peace, arbitration keeps faith with those who are fighting for the right to organize that peace.

OUTSTANDING ACHIEVEMENTS OF 1941

Before the United States entered the war, this Association had the only national and inter-American units that could be mobilized immediately for increasing production for defense. It was so mobilized by a special fund contributed by President Whitney.

When the United States entered the war, these facilities, including 30 branch offices and their executives and 8,000 volunteer arbitrators, were immediately converted into a war service system, again made possible by a contribution from Mr. Whitney.

Our War Service in the United States, through thirty efficient branches in key cities, with trained personnel, went into action as a result of the generous cooperation of the Motion Picture Producers, when the motion picture system of tribunals were opened to labor and commercial cases affecting war production. An average of 500 calls monthly are made by branch managers on business men, attorneys, defense industries and labor unions.

The Inter-American System has been able to swing into active service in Mexico, Colombia, Peru, Ecuador and Cuba through contributions from the Office of the Coordinator of Inter-American Affairs and with full approval of the Departments of State and Commerce and of the Pan American Union. Other Republics are to follow. More than 170 controversies have been referred to arbitration during the past year involving nearly all of the Republics.

International controversies have risen to the surface, continuing the international service shattered by the war. They come through the use of our arbitration clause in the British, Canadian, Australian and Amtorg Purchasing Agencies in the United States.

Arbitration is finding its way into U. S. government contracts and our services as administrator or in naming arbitrators is provided for in contracts let by the U. S. Maritime Commission for three billion dollars in Liberty Ships. It also appears in contracts of the Reconstruction Finance Corp., Federal Housing Authority and the Port Authority of New York.

Billions of dollars worth of commercial and war contracts in Michigan were provided with the protection of arbitration and production given a new speed-up when Michigan became the 14th state to make arbitration clauses in contracts legally valid. Minnesota became the 15th state when the court interpreted that law favorably to such legal enforcement.

The hazard of loosely drawn arbitration provisions in the thousands of collective bargaining agreements being drawn as a result of President Roosevelt's Order creating the National War Labor Board, was met when the Association prepared and distributed to 3,700 war industries and hundreds of unions a series of seven Wartime Labor Arbitration Clauses. With these as a guide, the drafting of arbitration clauses in labor agreements has improved immeasurably.

Somewhat contrary to expectations, the volume of arbitrations has increased, and the number of inquiries is far above 1940. Not only is the war production program increasing arbitrations somewhat in proportion as strikes decrease, but the drain on manpower in law offices, courts and administrative agencies is speeding the settlement of disputes by the short-cut of arbitration. The coqperation of members of the bar has never been more friendly.

The most spectacular expansion of the Association's work has been in the field of labor disputes. 115 unions have used the services of the Industrial Arbitration Tribunal. One Union alone reports our services are provided for in 114 contracts with textile mills; another reports the Association's clause in more than 100 collective bargaining agreements with broadcasting stations. Arbitration involving the largest number of employees was that between the Curtiss-Wright Corp. in Buffalo and the independent union representing 11,000 workers.

The Association's high record for acceptance of awards by both management and labor has been maintained, and only in less than 2 per cent of the cases arbitrated has a party refused to abide by the arbitrator's decision or made an attack upon the award in the courts.

Industries converting to war production have provided another field in which arbitration has been able to serve the all-out production program. An example is the Washing Machine Industry, now 100 per cent engaged in the manufacture of anti-aircraft gun mounts, using the Association's clause in the standard form of sub-contracts used throughout the industry.